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78-1688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-

CITY COUNCIL OF THE CITY OF PHILADELPHIA,
FRANK L. RIZZO, MAYOR
HILLEL LEVINSON, MANAGING DIRECTOR
AND THE CITY OF PHILADELPHIA, *Petitioners*

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, et. al.,
Respondents

[Additional Respondents listed inside cover]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ADDITIONAL RESPONDENTS

HOUSING TASK FORCE OF THE URBAN COALITION,

ESTHER SIERRA MENDEZ,

BERNICE DEVINE,

JEAN THOMAS,

MABLE SMITH,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RUSSELL BYERS, CARLA A. HILLS

ADDITIONAL PARTIES BELOW

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,
MULTICON CONSTRUCTION CORPORATION,
WHITMAN AREA IMPROVEMENT COUNCIL,
PHILADELPHIA HOUSING AUTHORITY

TABLE OF CONTENTS

		Page
I.	Opinions Below	2
II.	Jurisdiction	3
III.	Questions Presented	4
IV.	Constitutional Provisions, Statutes, and Rules of Civil Procedure Involved	2
V.	Statement of the Case	6
	A. Procedural History	6
	B. Factual Background	15
VI.	Reasons for Granting a Writ of Certiorari	20
	POINT I	
	By Enjoining the Operation of the Pennsylvania Urban Redevelopment Law, 35 P.S. §1710(j) and Removing Petitioner City Council From its Legitimate Legislative Role Under Pennsylvania State Law, the Courts Below Abused Their Injunctive Power	20
	POINT 2	
	The Decision Below Conflicts With the Decisions of This Supreme Court as to the Limitations Which Exist Concerning a Federal Court's Remedial Power	27
	POINT 3	
	The Decision Below Conflicts With the Decision of the Supreme Court of Pennsylvania as to the Equitable Power of the Courts to Pass Upon the Merits of a Proposed Redevelopment Contract	31

TABLE OF CONTENTS—*(Continued)*

	Page
VII. Conclusion	32
Certificate of Service	33
APPENDIX	
Memorandum Order of District Court Dated March 17, 1978	A-1
Memorandum Order of District Court Dated November 13, 1978	A-7
Resolution of the City Council of the City of Philadelphia Dated December 21, 1978	A-9
Memorandum Order of District Court Dated January 11, 1979 (Order challenged herein)	A-12
Order of United States Court of Appeals Concerning Briefing Schedule, Dated January 19, 1979	A-29
Order of Court of Appeals Dated March 7, 1979, Affirming the January 11, 1979 District Court Memorandum Order (Order challenged herein)	A-32
Order of Court of Appeals Dated April 2, 1979, Denying Petition for Rehearing	A-36
Order of Court of Appeals Dated April 9, 1979, Granting Motion for Stay of Mandate	A-37
The Pennsylvania Urban Redevelopment Law, 35 P.S. §1710(j)	A-38
Chart Listing Documents Concerning Implementation Orders of District Court	A-39
Whitman Park Noise Study, Prepared by Dames & Moore, Dated December 8, 1978	A-43
Constitutional Provisions, Statutes, and Rules of Civil Procedure Involved	A-53

TABLE OF CONTENTS—*(Continued)*

	Page
FEDERAL RULES OF CIVIL PROCEDURE	
Rule 39(b)	A-54
Rule 52(a)	A-54
Rule 60(b)	A-54
Rule 65(a)	A-55
Rule 65(d)	A-56

TABLE OF CITATIONS

CASES:	Page
Dandridge v. Williams, 397 U.S. 741, 25 L.Ed. 2d 441, 90 S. Ct. 1153 (1970)	5
Gautreaux v. Chicago, 480 F.2d 210 (7th Cir. 1973) cert. den. 414 U.S. 1144 (1974)	23, 24
Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers, 45 U.S. 423, 39 L.Ed. 2d 435, 94 S. Ct. 1113 (1974)	30
Hills v. Gautreaux, 425 U.S. 284, 47 L.Ed. 2d 792, 96 S. Ct. 1538 (1976)	4, 26, 29
Milliken v. Bradley, 418 U.S. 717, 41 L.Ed. 2d 1069, 94 S. Ct. 3112 (1974) (D.C. E.D. Mo., 1978	4, 26, 27
Parkview Heights Corp., et al. v. City of Black Jack, et al., 454 F.S. 1223	26
Rizzo v. Goode, 423 U.S. 362, 46 L.Ed. 2d 561, 96 S. Ct. 598 (1976)	5, 26, 29
Schenck v. Pittsburgh, et al., 364 Pa. 31, 70 A.2d 612 (1950)	31

TABLE OF CONTENTS—*(Continued)*

Cases:	Page
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L.Ed. 2d 554, 91 S. Ct. 1267 (1971)	4, 26, 27
U.S. CONSTITUTION:	
Amendment XIV	7
FEDERAL STATUTES:	
28 U.S.C. §1254(1)	3
42 U.S.C. §1981	7
42 U.S.C. §1982	7
PENNSYLVANIA STATUTES:	
Pennsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 35 P.S. §1710(j)	4, 15-22, 26, 29-31
RULES:	
Federal Rules of Civil Procedure:	
Rule 39(b)	30
Rule 52(a)	30
Rule 60(b)	30
Rule 65(a)	30
Rule 65(d)	30
City Council of the City of Philadelphia Resolution of December 21, 1978	11

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Hillel Levinson, Managing Director
and the City of Philadelphia,
Petitioners

v.

Resident Advisory Board of Philadelphia, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners CITY COUNCIL OF THE CITY OF PHILADELPHIA, et al. respectfully pray that a Writ of Certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered on March 7, 1979.

I. OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Pennsylvania, dated January 11, 1979, is not yet officially reported but is printed in the Appendix hereto, (A-12 - A-28). The Appendix is hereafter cited as ("A__"). No opinion was rendered by the United States Court of Appeals for the Third Circuit. The Court of Appeals' Judgment Order of March 7, 1979, affirming the January 11, 1979 judgment of the District Court is not yet officially reported but is printed in the Appendix hereto, (A-35).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

(See Appendix at A-53)

II. JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on March 7, 1979. A timely Petition for Rehearing en Banc was denied on April 2, 1979, (A-36) and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

1. Whether the approval or disapproval of the terms of a proposed redevelopment contract for the Whitman Park Townhouse Project is within the sole discretion of the City Council of the City of Philadelphia pursuant to the provisions of The Pennsylvania Urban Redevelopment Law, 35 P.S. § 1710(j).

2. Whether it is an abuse of the injunctive powers of the federal courts for a district court to enjoin the operation of the Pennsylvania Urban Redevelopment Law, 35 P.S. § 1710(j) in the absence of any evidentiary finding or conclusion of law that said statute is unconstitutional "on its face" or "by its operation."

3. Whether, in light of *Milliken v. Bradley*, 418 U.S. 717, 41 L.Ed. 2d 1069, 94 S. Ct. 3112, it is inappropriate for a federal court to assume the role of a "de facto legislature" by deciding the "legislative question" and usurping the powers and duties of the City Council of the City of Philadelphia under a valid state land-use statute.

4. Whether in light of *Hills v. Gautreaux*, 425 U.S. 284, 47 L.Ed. 2d 792, 96 S. Ct. 1538 (1976) it is inappropriate for a federal district court in formulating a remedy for a constitutional violation to "displace" the rights and power accorded to a local legislature under state land-use laws. (35 P.S. § 1710(j)).

5. Whether, in light of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L.Ed. 2d 554, 91 S. Ct. 1257 (1971), it is inappropriate for a federal court to render a decision and vote of a municipal legislature "null and void" in the absence of a finding that said legislative action resulted in a constitutional violation.

6. Whether it is a clear abuse of discretion for a district court to order the execution of a complex Seven Million Dollar redevelopment contract and agreement of sale for a 4½ acre building site where the district

court has never seen or read the contract in quesiton and where said contract was not a part of the official record before the lower court.

7. Whether a municipal legislature is entitled to an evidentiary hearing where one of its legislative decisions (votes) is challenged in the federal courts and whether such a hearing should be held prior to the courts' rendering of a decision or imposing remedial action concerning said disputed legislative action.

8. Whether it is a clear abuse of discretion for a district court to deny a Motion for Modification of a previously entered remedial decree (brought pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6) where substantial evidence is presented as to a public health hazard which would result from the implementation of said remedial decree.

9. Whether it is an abuse of the injunctive power of the federal courts for a court to order the construction of a housing project on a specific building site when the redevelopment contract for said site has been disapproved for legitimate reasons by a local legislature and where alternative redevelopment of scattered site low-income housing in the same area as the proposed project will enable the municipality to develop or rehabilitate over twice as many units (250) as the proposed townhouses project (120 units) for the same amount of money.

10. Whether in light of *Rizzo v. Goode*, 423 U.S. 362 (1976) it is inappropriate for a federal district court to "displace" the rights and power accorded the mayor of a municipality under state and local statutes concerning the enactment of land use ordinances.

11. In light of *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L.Ed. 2d 491, 502, 90 S. Ct. 1153 (1970) is it inappropriate for a federal court to impose upon a municipality the courts' views of what constitutes wise economic and social policy concerning the development of low-income housing within the municipality's jurisdiction.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This case concerns the construction of a federally funded 120-unit, low-income housing project in an Urban Renewal Area of South Philadelphia, known as Whitman Park. The controversy over this housing project dates back to 1956 when the Front Street and Oregon Avenue, four and one-half (4½) acre site was selected for a low-income housing project.

On November 5, 1976, the District Court for the Eastern District of Pennsylvania, filed Findings of Fact and Conclusions of Law and entered a judgment order which directed the Philadelphia Housing Authority ("PHA") the Redevelopment Authority for the City of Philadelphia ("RDA") the City of Philadelphia, and the Department of Housing and Urban Development ("HUD") to proceed immediately with "all necessary steps" for the construction of 120 townhouses on a building site located at Front Street and Oregon Avenue in the Whitman Park Urban Renewal Area of Philadelphia. 425 F. Supp. 987 (Ed. Pa. 1976).[1]

This injunctive relief was imposed as a result of three conclusions of law found by the District Court: First, that the City failed to comply with an affirmative duty under Title VIII of the 1968 Civil Rights Act, particularly 42 U.S.C. §3608(d)(5), to promote and encourage the construction of public housing projects which would lessen racial concentration; second, that the activities of City officials in connection with halting the Whitman Park Project had a racially discriminatory effect violative of Title VIII of the 1968 Civil Rights Act and that the City's activities had not been justified by a compelling state interest; and third, that the City, through its officials, acted with a racially

1. The 84 page November 5, 1976 Opinion is also reprinted in the certified record of this litigation at (R. 24). Hereinafter the record is cited as "R —."

discriminatory intent in attempting to halt construction of the Whitman Park Project. Of significance is the fact that the November 5, 1976 Order of the District Court did *not* make any finding of fact or conclusions of law concerning Petitioner City Council of the City of Philadelphia except to note the purpose of City Council's joinder in the litigation.

The Third Circuit Court of Appeals on August 31, 1977 affirmed the holding of the District Court that the "City of Philadelphia" through its officials had violated 42 U.S.C. §1981 and §1982 by depriving respondents of constitutional rights guaranteed by the Thirteenth and Fourteenth Amendments to the United States Constitution. 564 F.2d 126 (3rd Cir. 1977) (R. 68). The Court of Appeals made no findings with respect to Petitioner City Council of the City of Philadelphia.

A Petition for Certiorari was denied by this Supreme Court on February 27, 1978.

Ten days prior to the denial of Certiorari, on February 17, 1978, the District Court scheduled a hearing for March 3, 1978. At said hearing, all parties including petitioners, advised the District Court that they intended to comply with the District Court's Order of November 5, 1976. The District Court requested that all parties attempt to develop a proposed "Implementation Order" which would set forth with particularity the specific "necessary steps" which had to be taken by the various parties in order for construction to begin on the 120 unit townhouse project.

There was no consent agreement nor any other written stipulation, or agreement between the parties herein concerning the entire and complete terms of any proposed implementation order.

On March 17, 1978, the District Court issued its initial Implementation Memorandum and Order. (A-1). Paragraph #15 of this March 17, 1978 Order provided:

> "15. City Council shall expeditiously consider the new redeveloper and the redevelopment con-

tract, and final action by Council in connection therewith shall be taken no later than November 9, 1978." [Modified to December 29, 1978] (A-5).

Thus, the District Court held on March 17, 1978 that City Council's consideration and action on the proposed redevelopment contract was an essential or "necessary step" which must be undertaken as part of the development process for the Whitman Park Townhouse Project.

After the District Court issued its March 17, 1978 implementation order, Respondents RAB and HUD never raised any objection to the terms of Paragraph #15 which provided for consideration and action by Petitioner City Council with respect to the new proposed redevelopment contract. The March 17, 1978 Implementation Order was amended by the District Court — four (4) times: On June 30, 1978, October 13, 1978, November 3, 1978 and November 13, 1978. (See Appendix hereto for Chart on Provisions in the various Implementation Orders relating to Petitioner City Council at A-39).

The November 13, 1978 Order modified the time deadline for City Council to consider and take final action on the Redevelopment Contract. The deadline was extended until December 29, 1978.

On November 21, 1978, pursuant to the provisions of Paragraph #14 of the "Implementation Order" of the District Court, as amended, RDA submitted to the Philadelphia City Council, Bill No. 1706 which contained the proposed new Redevelopment Contract and other documents concerning the 120-unit Whitman Park Townhouse Project which was to be located at Front Street and Oregon Avenue on a 4½ acre site.

The Bill was assigned to the Rules Committee of City Council, and public notice was given pursuant to the provisions of the Philadelphia City Charter that a public hearing on Bill No. 1706 would take place on December 13, 1978.

On December 13, 1978, the Rules Committee of the City Council held a public hearing which lasted over nine (9) hours and ended after 11:00 p.m. at night. (See Resolution of City Council of December 21, 1978 (A-9).

The public hearings resulted in the Rules Committee voting Bill No. 1706 out of Committee "without recommendation." On December 21, 1978, City Council debated the matter and voted to defeat Bill #1706. The vote was eleven (11) Councilmen and Councilwomen *against* approval of the Bill — five (5) Councilmen and Councilwomen in favor of approval of the Bill. (One Councilwoman was absent and did not vote on the matter.)

Thus, Petitioner City Council had by its legislative action disapproved the proposed redevelopment contract and proposed developer for the 120-unit housing project.

About thirty minutes after Council's disapproval of Bill #1706, Petitioner City Council voted to approve a Resolution providing for the development of 250 units of low-income housing in the same urban renewal area as the 120-unit townhouse project.[2] This resolution was titled:

> Resolution: Requesting the Redevelopment Authority of Philadelphia to prepare plans and

2. City Council voted to disapprove the proposed Redevelopment Contract for totally legitimate reasons. Council was aware that the Federal Courts had ordered 120 units of low-income housing to be built in the Whitman Park neighborhood, but City Council could not in good faith approve the proposed Redevelopment Contract nor the proposed redeveloper nor the proposed building site for the 120 houses on 4½ acres which were shown to be environmentally unsafe.

City Council voted to develop over twice as many homes (250) on *scattered sites* in the same neighborhood, as the proposed Project and *for the same cost* as the 120-unit project. The District Court rejected City Council's proposal for 250 units on scattered sites when the Court denied Petitioners' Motion for Modification of the November 5, 1976 Order. (See January 11, 1979 Order, A-26).

select a redeveloper for the development of not less than 250 dwelling units on scattered sites within the Whitman Urban Renewal Area under certain terms and Conditions. (A-9).

This Resolution explains, in part, City Council's motivation and reasons for disapproving Bill #1706:

WHEREAS, As elected representatives of the people of Philadelphia, the Council desires to do what it thinks is right for those people while cooperating with the Federal Judiciary, for which it has the utmost respect; and

WHEREAS, Council continues to encourage the development of subsidized housing for non-elderly in non-impacted areas and needs the cooperation of the U.S. Department of Housing and Urban Development to that end; and

WHEREAS, it is the express intent of City Council that the City of Philadelphia, through its officers and employees, shall administer all programs and activities relating to housing and urban development in a manner which affirmatively promotes fair and non-discriminatory housing; therefore

Resolved, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That the Redevelopment Authority is hereby requested, when concurred in by the Federal Court, to prepare an ordinance, complete with plans, specifications, contracts and any other necessary documents, *for the development of not less than two hundred and fifty (250) units of housing for low-income persons, on scattered sites, in the Whitman Urban Renewal Area.*

Resolved, That upon receipt of such documents together with approval and commitment for funding from the Department of Housing and

Urban Development, the Council will direct all administrative agencies of the City having responsibilities to act on such matters to do so forthwith so that the development of housing units for low-income persons in the Whitman Urban Renewal Area may proceed.

Resolved, That certified copies of this Resolution shall be forwarded to the Federal Court for the Eastern District of Pennsylvania, the Mayor, the Philadelphia Housing Authority, the Philadelphia Redevelopment Authority, the Philadelphia Housing Authority, the Philadelphia Planning Commission, the Philadelphia Office of Housing and Community Development, and the United States Department of Housing and Urban Development. (emphasis added). (A-11).

The December 21, 1978 Resolution of City Council stated that the public hearings of December 13, 1978 established the following testimony and evidence concerning the disapproved Redevelopment Contract for the 120-unit townhouse project:

1. That the houses to be built as a "Modified Turnkey III" Project would cost between $57,000 and $61,000 each, this without the original cost of acquisition and demolition.

2. Expert testimony that the noise level at the site exceed those levels determined by the U.S. Environmental Protection Agency to be hazardous to human health.

3. That a survey to satisfy the requirements of the National Environmental Protection Act (NEPA) was started by the Department of Housing and Urban Development and then cancelled before it was completed.

4. That no Turnkey III Project has been successful in the entire United States, and that the

120 units could become a straight P.H.A. rental project, voiding the planned purpose of home ownership.

5. As of now, there are neither valid plans nor workable financial proposals for a Modified Turnkey III Project.

6. There was testimony that the proposed redeveloper's qualifications and ability to fulfill the Redevelopment Contract were questionable.

7. That it was almost unanimous that rehabilitated units in scattered sites would better serve the interest of all of the citizens of Philadelphia and in particular the interest of the low-income families and minorities.

8. That housing units on scattered sites would cost between fifteen and thirty thousand dollars each, allowing for the production of many more housing units and assist in renewing the Whitman area.

9. That many other neighborhoods throughout the City were against the development of projects such as proposed, but do favor a scattered site approach.

10. That application, already taken by "Whitman Council" for scattered site rehabilitated housing in the Whitman Area resulted in 140 applicants, 70 for white families, 70 for minority families."

(See December 21, 1978 Resolution of the City Council of Philadelphia, (A-9).

On the very same day that petitioner City Council voted to disapprove Bill #1706 (The Redevelopment Contract and Developer) and approved the "Scattered Site Resolution" (December 21, 1978), Respondents RAB filed with the District Court their "Motion to Suspend Operation of 35 P.S. §1710 for the Whitman Park Townhouse Project and to order defendants, PHA and RDA to execute the contract with the Selected Redeveloper to allow the construction of the project."[3] (R255)

On December 27, 1978, Petitioner, City Council of the City of Philadelphia and other municipal petitioners filed with the District Court their "Memorandum of Law in Opposition to [Respondent R.A.B.'s] Motion to Suspend Operations of 35 P.S. §1710 and other injunctive relief." (R267).

On December 28, 1978, Respondent R.A.B. submitted their Supplemental Motion to Suspend Operations of 35 P.S. §1710. On the same day, Petitioner, City Council of the City of Philadelphia and other Municipal Petitioners filed with the District Court their Motion for Modification of the November 5, 1976 and March 17, 1978 Orders of the District Court, as amended. (R-301).[4]

The District Court denied Petitioners' request that it grant leave to make oral argument on the issues concerning Respondent's Injunctive Motion.

The District Court did not provide Petitioner City Council of the City of Philadelphia, et al., with an opportunity for a preliminary hearing or even a final trial on the merits concerning Respondents', RAB and

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3. Respondent RAB's Motion for relief which was filed with the District Court on December 21, 1978 is in fact, a Motion for *Permanent Injunctive Relief*. Respondent utilized thirty-three (33) words to "title" this Motion for relief (they actually spelled out in the title the relief requested in the body of their Motion.

4. Petitioners' Motion for Modification of the November 5, 1976 and March 17, 1978 Orders requested in part that the District Court modify its injunctive order to permit 250 units of low-income housing to be developed on scattered sites in the same neighborhood, and in place of, the Court-ordered 120-unit project to be built on a 4½ acre site. This Motion is in accordance with the provisions of the resolution adopted by City Council on December 21, 1978.

HUD's, Motion for Injunctive Relief or Petitioners' Motion for Modification.

The District Court issued its Memorandum Order on January 11, 1979, as to which this Petition pertains, (see A-12), whereby the Court granted Respondents' requested injunctive relief by (1) ordering that the operation of 35 P.S. §1710 (The Pennsylvania Urban Redevelopment Law) is "*suspended,*" (2) amending its Memorandum Order of March 17, 1978 to totally *exclude* the Philadelphia City Council from the procedural process whereby the Townhouse Project would be constructed in Philadelphia, (3) in effect, declaring and rendering the December 21, 1978 legislative vote by Petitioner City Council (disapproving the proposed redevelopment contract) as "null and void," (4) the District Court clothed itself in the robes of a "de facto" legislature by enjoining the Redevelopment Authority of the City of Philadelphia, the Philadelphia Housing Authority[5] and HUD to execute the proposed Redevelopment Contract and Agreement of Sale with A&R Development Corp./The Waterford Group, Inc. on or before January 19, 1978, (5) the Memorandum Order of the District Court of January 11, 1979 also denied Petitioners Motion for Modification of the District Court's November 5, 1976 Order.

On January 19, 1979, the Third Circuit Court of Appeals granted Petitioners' Motion to Stay the January 11, 1979 Order of the District Court. The Court of Appeals ordered an expedited briefing schedule.

On March 7, 1979, the Third Circuit Court of Appeals issued a Judgment Order, without opinion, and the Clerk of the Court of Appeals entered judgment in accordance therewith on the same date. (A-32). Said Judgment-Order *affirmed* District Court's Order of January 11, 1979, including its injunctive and declaratory relief. (A-35).

5. Both PHA and RDA were party defendants below, but are state agencies, not Philadelphia municipal agencies.

On March 20, 1979 Petitioner filed in the Court of Appeals a Petition for Rehearing In Banc. The Third Circuit Court of Appeals denied said Petition on April 2, 1979. (A-36).

On April 9, 1979, the Third Circuit Court of Appeals granted Petitioner's Motion for Stay of Mandate pending the filing of this Petition for Certiorari by May 9, 1979. (A-37).

B. FACTUAL BACKGROUND

1. PETITIONER CITY COUNCIL

Respondent Resident Advisory Board (RAB) filed their Complaint in this litigation in the United States District Court for the Eastern District of Pennsylvania on June 25, 1971. Respondent delayed over three (3) years before attempting to join Petitioner City Council of the City of Philadelphia as a party herein. Respondent RAB filed their Motion to Join City Council on May 16, 1975 (R7). Petitioner City Council is the legislature for the City of Philadelphia. It consists of 17 Councilwomen and Councilmen representing the citizens of the City of Philadelphia either by "district" or in an "at-large" capacity.

As a result of Respondent RAB's 1975 Motion to Join City Council, the issue of whether or not the District Court has the equitable power to *compel* City Council to "approve" an ordinance enabling the Redevelopment Authority (RDA — a state agency) to contract with a new developer for the housing project was initially raised (R7). In said Motion, Respondent RAB asserted that joinder of Petitioner City Council was necessary "so that complete relief can be afforded to plaintiffs."

Respondent RAB themselves, after citing 35 P.S. §1710(j) of the Pennsylvania Urban Redevelopment Law (A-38) stated:

> That if Multicon Properties, Inc. is for financial reasons unable to complete construction of the

> Whitman Townhouses, a new developer will need to be appointed, which may pursuant to the above cited statutory provision, [35 P.S. §1710(j)] need to be approved by City Council. (R-11)

Thus, Respondent RAB, in May of 1975, recognized City Council's role pursuant to the provisions of 35 P.S. §1710(j). It was the existence of the Pennsylvania Urban Redevelopment Law 35 P.S. §1710(j) which formed the basis for Respondent RAB's Motion to join City Council as a party herein. Respondents recognized over three (3) years ago that pursuant to the Pennsylvania Urban Redevelopment Law, Petitioner City Council had an important legislative role to fulfill in order for any housing project to be constructed in the City limits of Philadelphia. (R7).

The District Court in 1975, granted Respondents' Motion and joined City Council as a party defendant ". . . in the event the Council was needed to insure that the Court could render appropriate relief." 425 F. Supp. 987 at p.995 (E.D. Pa. 1976).

Respondents have never alleged and/or proven that City Council or the individual Councilmen and Councilwomen have in any way taken action which has caused Respondents herein any injury or deprived them of any rights or interests. Both the opinion of the District Court at 425 F. Supp. 987 (E.D. Pa. 1976), and the opinion of the Third Circuit Court of Appeals at 564 F.2d 126 are totally void of any claim or finding of fact with respect to Petitioner City Council or its members. The opinions merely note the purpose for which City Council was joined as a party herein. Prior to the January 11, 1979 Order by the District Court, which is the object of this appeal, there had *not* been any ruling, by any Court, that Petitioner, City Council has, by its actions, infringed upon Respondents rights or interests. In fact the January 11, 1979 Order does not make any specific finding as to this alleged wrong which has never in fact occurred.

2. THE PENNSYLVANIA URBAN REDEVELOPMENT LAW (35 P.S. §1710(j) REQUIRES APPROVAL OF REDEVELOPMENT CONTRACTS BY CITY COUNCIL PRIOR TO THE CONTRACTS' EXECUTION.

The Pennsylvania Urban Redevelopment Law (35 Purden's Statutes (P.S.) 1701, et seq) (A-38) was enacted on May 4, 1945, P.L. 991 §1, et seq. and has been amended by the Pennsylvania State Legislature several times. This law provided for the establishment of Redevelopment Authorities and specifies the relationship between said authorities and the municipality in which it is located.

It is 35 P.S. §*1710* of the Pennsylvania Urban Redevelopment Law which Respondent RAB challenged in their injunctive motion which resulted in the January 11, 1979 Order. This State Statute provides for the preparation and adoption of redevelopment proposals, and *redevelopment contracts* concerning housing projects to be developed within the State of Pennsylvania. 35 P.S. §1710(j) provides as follows:

> "(j) The redevelopment proposal may contain the form of the redevelopment contract with the redeveloper selected and upon approval by the governing body of the proposal, as hereinbefore provided, the Authority is authorized to execute the said redevelopment contract. *If the proposal does not contain the form of the redevelopment contract with the redeveloper selected, the Authority shall not execute a redevelopment contract with a redeveloper thereafter selected, until the said redevelopment contract shall have been approved by the governing body.* No additional public hearing, notice or publication shall be required with respect to such approval. (Emphasis supplied). (See A-38)

Under 35 P.S. §1710(j) the Philadelphia Redevelopment Authority (a State agency) cannot execute the 1979 proposed Whitman Park Redevelopment Contract with the new proposed redeveloper for the Whitman Park Townhouse Project without Petitioner City Council's[6] (1) approval of the terms of the Redevelopment Contract, and (2) making a finding that said redevelopment contract is in substantial conformity with the redevelopment proposal previously passed by City Council.

The District Court recognized the existence and operation of 35 P.S. §1710(j) in 1975 when it first joined City Council as a party herein and again when it issued its Implementation Order of March 17, 1978. (A-5)

Respondent RAB stated their recollection of the facts surrounding the District Court's decision to *include* City Council in its Implementation Order in Respondents' "Memorandum in Support of Motion to Suspend Operations of 35 P.S. §1710 for the Whitman Townhouse Project and To Order The Defendants to Proceed With Construction":

> "After the Supreme Court denied certiorari counsel for all parties met with the court to develop an agreed vehicle and method for implementation of the extent Order of November 5, 1976. *The City Solicitor argued, over plaintiffs' dissent, that 35 P.S. §1710 required that an amended redevelopment contract naming a new developer had to be submitted to City Council and the Mayor for approval.* Plaintiffs argued that §1710 only applied to the original development proposal, and since City Council had already approved the Whitman Project in Bill No. 2037 on October 27, 1970, and furthermore in light of the Court's affirmed holding that the City of Philadelphia violated the Fourteenth

6. (The "governing body" as defined in 35 P.S. §1701 et seq.)

> Amendment to the Constitution by suspending construction of the Whitman Project, the Court could order the defendants to execute contracts with the selected developer and allow construction to commence without the approval of City Council. *The Court determined to take the most cautious route, however, and the parties agreed to a timetable*, which has since been modified at the request of various parties, *which included consideration of the developer and the Redevelopment Contract by the City Council and the Mayor.*" (Emphasis added). (R260).

The District Court included Petitioner City Council's consideration and vote on the proposed Seven Million Dollar Redevelopment Contract as mandatory step #15 in the Court's March 17, 1978 Implementation Order. (A-5).

Petitioner City Council *carried out* its responsibilities under 35 P.S. §1710(j) and Paragraph #15 of the District Court's November 13, 1978 Implementation Order.

Petitioner City Council held public hearings on December 13, 1978 with respect to the proposed 1979 Redevelopment Contract and proposed redeveloper for the Whitman Townhouse Project. Said public hearings lasted over nine (9) hours. On December 21, 1978, (eight (8) days *prior* to the District Court's deadline of December 29, 1978, under Paragraph #15 of the March 17, 1978 Implementation Order as amended) City Council took "final action" with respect to Bill #1706 (concerning the proposed Redevelopment Contract and Redeveloper), by voting 11-5 to *disapprove* said Bill.

REASONS FOR GRANTING THE WRIT

POINT I

BY ENJOINING THE OPERATION OF THE PENNSYLVANIA URBAN REDEVELOPMENT LAW, 35 P.S. §1710(J) AND REMOVING PETITIONER CITY COUNCIL FROM ITS LEGITIMATE LEGISLATIVE ROLE UNDER PENNSYLVANIA STATE LAW, THE COURTS BELOW ABUSED THEIR INJUNCTIVE POWER.

By its Injunctive Order of January 11, 1979, (as affirmed without opinion by the Court of Appeals) the District Court enjoined the operation of an important State statute (The Pennsylvania Urban Redevelopment Law, 35 P.S. §1710(j)) (See A-38) which empowered Petitioner City Council of the City of Philadelphia with the legislative duty and prerogatives to review, evaluate and decide by legislative vote, the question of whether to approve or disapprove proposed "redevelopment contracts" concerning land use in the City of Philadelphia.

City Council had voted (11-5) on December 21, 1978 to *disapprove* the proposed redevelopment contract for the Whitman Park Townhouse Project. The District Court, *without ever even seeing or evaluating the disputed Seven Million Dollar ($7,000,000) contract,* without affording Petitioners oral argument *nor any hearing whatsoever* on the matter of City Council's decision, granted Respondents' Motion to *Suspend* the Operation of the Pennsylvania Urban Redevelopment Law and further ordered that the proposed contract be executed.

In its January 11, 1979 Memorandum Order, the District Court made no findings of fact or conclusions of law concerning petitioner City Council which could in any way support the imposition of the injunctive relief as ordered. City Council voted to disapprove the proposed redevelopment contract for totally legitimate reasons including the protection of the health and safety of the citizens of Philadelphia, particularly those citizens who would have resided in the proposed townhouse project.[7] The District Court made no findings as to the purpose or justifications behind City Council's December 21, 1978 legislative actions. The lower Court failed to examine if the December 21, 1978 legislative actions of the Philadelphia City Council had any negative "impact" upon respondents herein. A careful review of City Council's legislative action clearly establishes that Respondents would not suffer any harm as a result thereof, since on the same day as City Council voted to disapprove the proposed redevelopment contract, Council passed a resolution calling for the development of 250 units of low-income housing on *scattered-sites* throughout the same neighborhood where the proposed Front and Oregon Avenue building site is located. The critical element in this litigation is the development of low income homes in a non-racially impacted area. The terms of the redevelopment contracts for such housing units and the specific locations for each home is a matter rightfully within the discretion of the *local* government, not the federal courts.

Through its injunctive order of January 11, 1979, the District Court "deleted" the important provisions of the Court's implementation Order which were mandated under Pennsylvania State Law, 35 P.S. §1710(j).

7. The record and evidence before City Council reveals that the Townhouse Project site at Front and Oregon Avenue is an unsafe site for residential use as a result of the extremely high noise levels which exist there. This was the conclusion of a scientific Noise Study conducted at the Whitman Park Townhouse Project site at Front Street and Oregon Avenue. (728R). The study was performed by Dr. Frederick Kessler of the highly respected firm of Dames and Moore, Engineering Consultants. Dr. Kessler's Report was submitted to City Council during his testimony before City Council's Rules Committee Public Hearings on Bill #1706. See A-43 for said Noise Study.

Paragraph #15 specified that City Council was to consider and take final action upon the proposed redevelopment contract.

It should be noted that the 'deletion' of paragraph #15 from its Implementation Order was two weeks *after* the fact. Petitioner City Council actually carried out the mandate of paragraph #15 by voting on December 21, 1978 to disapprove the redevelopment contract. The 'deletion' of paragraph #15 on January 11, 1979 renders Petitioner City Council's legislative decision concerning the Redevelopment contract for the Whitman Park Townhouse Project 'null and void' or as if such legislative action never took place. The fact remains City Council considered the proposed new Redevelopment Contract and took 'final action' upon it by voting 11-5 against approval of this contract. Said December 21, 1978 legislative decision by Petitioner City Council was valid and conformance with Council's duties and responsibilities under the Pennsylvania Urban Redevelopment Law, 35 P.S. §1710(j). Said Councilmanic decision was also made pursuant to, and in conformance with, the provision of paragraph #15 of the District Courts Implementation Order of November 15, 1978 (A-8) which instructed City Council to act upon the Redevelopment Contract.

The District Court just 'disagreed' with Petitioner City Council's valid legislative decision. The Court issued an order which decrees City Council's legislative action of December 21, 1978 as 'non-existent' and enjoins the Redevelopment Authority (RDA) to execute a Seven Million Dollar ($7,000,000) redevelopment contract in violation of 35 P.S. §1710(j) which mandates that RDA must get City Council approval of the Redevelopment Contract before RDA executes the contract with the new redeveloper.

Of further importance, is the fact that City Council had public hearings and lengthy consideration of the actual terms of the redevelopment contract. The Re-

development Contract was submitted to City Council as an Exhibit to Bill #1706 (R-175), *while the District Court, was never presented on the record, or otherwise with a copy of this proposed Redevelopment Contract.* The Court never saw its terms or conditions and certainly never compared the new proposed contract with the old expired 1970 redevelopment contract executed by Multicon, Inc. (the original developer). There just did not exist any evidentiary basis for the District Court to make any decisions concerning said proposed contract, let alone enjoin the operation of a valid State Statute and render 'null and void' the reasoned legislative decisions of Petitioner City Council of the City of Philadelphia.

It is fundamentally unwise for a federal district judge to assume the role and responsibilities of a local legislature concerning redevelopment and land use within said legislatures' jurisdiction. By ordering that the redevelopment contract (which was never read by the Court below) be executed, the lower courts have in effect placed themselves into the role of a "de facto" legislature and decided from within an "evidentiary vacuum" the legislative question which was the proper concern of Petitioner City Council.

The District Court states in its January 11, 1979 Memorandum:

> "In any event, the law is clear that this Court, for the purpose of remedying the Constitutional violations, has the power to suspend the operation of such a statute, [35 P.S. §1710(j)] (A-25).

The Court then cites *Gautreaux v. Chicago*, 480 F.2d 210, 214 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974) as legal authority that "The District Court has undoubted power to suspend the operation of the state statute." [332a].

The District Court incorrectly cites the 1973 decision of the Seventh Circuit Court of Appeals in *Gau-*

treaux v. Chicago, 480 F.2d 210 (7th Cir. 1973) as precedent for the injunctive relief which it has granted by its January 11, 1979 Order. The circumstances in *Gautreaux* were extremely different than those which exist in the instant matter. *In Gautreaux* the District Court, *after a full hearing on the matter*, found that for over *nine months* no committee of the City Council of Chicago had conducted hearings as to the acquisition of property by the Chicago Housing Authority (CHA), which had previously been ordered to increase the supply of dwelling units for low-income families. This *inaction* by Chicago's City Council occurred even though CHA had proposed sites for over 1500 dwelling units (scattered site units). The Chicago City Council *had not approved* the acquisition of any property by CHA for the purpose of providing housing in conformity with a previous judgment order of the District Court. The District Court further found the *failure* of Chicago's City Council to *conduct hearings* and to *approve* any property acquisition *for over 9 months* was *unjustified* since there had been no *showing of supervening necessity* therefor *or any reason* at all, and the evidence showed that many sites were suitable for approval of Council. The District Court found as a conclusion of law that the *inaction* of Chicago's City violated plaintiffs' Fourteenth Amendment rights and further held that the effect of the operation of a particular Illinois statute which mandated City Council approval of all land acquisition of CHA was to prevent the Court from providing a full remedy for past unconstitutional acts of the City of Chicago. The District Court ordered that the Illinois Statute "shall not be applicable to CHA'S actions." 342 F. Supp. 827 at 830 (1972).

The Seventh Circuit Court of Appeals at 480 F.2d 210 (1973) affirmed the District Court's injunction and made additional findings of fact and conclusions of law holding that the Chicago City Council-". . . by its *earlier discriminatory action* and *later by its inaction* has made itself a party to the discrimination as a joint participant." 480 F.2d at 214. This holding was based on the fact that prior to 1969 the Chicago City Council had vetoed over 99½% of the public housing sites proposed for development in white areas while it rejected only 10% of such proposed sites located in minority areas. Further, City Council had taken virtually no action on any proposed sites for over 9 months after the District Court had ordered that 75% of all public housing dwelling units be constructed in white areas. The Court of Appeals in *Gautreaux* held ". . . the record supports the trial courts' conclusion that only race can explain the defendant's action and subsequent inaction." 480 F.2d 210 (1973).

Contrary to the *Gautreaux* case, there had been no delay whatsoever by Petitioner City Council of Philadelphia with respect to taking legislative action on the proposed redevelopment contract. In addition, the record of City Council's actions of December 21, 1978 establishes that Council passed a Resolution containing a framework whereby the development of 250 scattered sites low-income housing units could be implemented in the Whitman Park Urban Renewal Area. No evidence whatsoever has been presented by Respondents herein which could establish that City Council, by its actions of December 21, 1978 has been in active concert or "joint participation" with other parties herein who have previously been found to have violated plaintiffs' Fourteenth Amendment rights. Indeed there has been no allegation herein that City Council in disapproving the redevelopment contract has acted with racial intent or purpose as had been established in the *Gautreaux* case.

The absence of all of the critical elements of proof herein distinguishes the *Gautreaux* case.

A federal court cannot enjoin the operation of a state statute absent a determination that said Statute, on its face or by its operation, infringes upon constitutional rights.

The equity powers of the Federal Courts to grant remedial injunctive relief which inteferes with the operation of a local governmental entity is not plenary. It may be exercised only on the basis of a constitutional violation. *Hills v. Gautreaux*, 425 U.S. 284, 293, 47 L.Ed 2d, 792, 96 S.Ct. 1538 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738, 41 L. Ed.2d 1069, 94 S.Ct. 3112 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 401 U.S. 1, 16, 28 L.Ed. 2d 554 (1971). See also *Park View Heights Corp., et al v. City of Black Jack, et al*, (D.C. E.D. Mo. 7-78), 454 F.S. 1223; *Rizzo v. Goode*, 423 U.S. 362, 377, 46 L.Ed. 2d 561, 96 S.Ct. 598 (1976).

Respondents have never alleged that 35 P.S. §1710(j) is in any manner unconstitutional "*on its face.*" The "essence" of Respondents' allegations contained in their injunctive motion is that the "*operation*" of 35 P.S. §1710(j) has the *effect* of depriving plaintiffs of certain constitutional rights. This Court should note, however, that Respondents, in their Motion to suspend the operations of 35 P.S. §1710(j) have *not* specified which, if any, of their constitutional rights have been infringed upon by the operation of this statute.

The *operation* of 35 P.S. §1710(j) has *not* had the effect of infringing upon any rights or interests of Respondents herein.

In affirming the District Courts' grant of relief, the Circuit Court authorized the District Court to stray far beyond the bounds of judicial power, experience and competence. The Circuit Court ignored or overlooked the decisions of this Court which your Petitioners submit preclude the type of injunctive relief granted herein. To remedy these errors, Petitioners respectfully request this Court to grant this petition for certiorari.

POINT 2

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS SUPREME COURT AS TO THE LIMITATIONS WHICH EXIST CONCERNING A FEDERAL COURT'S REMEDIAL POWER.

(A) THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN *SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION*, 402 U.S. 1, 16, 28 L.Ed. 2d 554, 91 S. Ct. 1257 (1971).

The decision of the district court, as affirmed without opinion by the Third Circuit Court of Appeals, is in direct conflict with the holding of this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, supra, that the remedial power to do equity may be exercised "only on the basis of a *constitutional violation*" and the nature of the violation determines the scope of remedy (Id at 402 U.S. 15, 16). The January 11, 1979 Order of the District Court herein *does not contain any conclusion of law that a constitutional violation has occurred as a result of City Council's vote on December 21, 1978. On the contrary, the disapproval of City Council of the proposed redevelopment contract for the 120 unit townhouse project has never been proven to have the effect of depriving anybody of their constitutional rights and in fact no constitutional violation has occurred as a result of City Council's legislative action.*

(B) THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISIONS IN *MILLIKEN v. BRADLEY*, 418 U.S. 717, 41 L.Ed. 2d 1069, 94 S. Ct. 3112.

The decision of the District Court is in direct conflict with the holding of this Court in *Milliken v. Brad-*

ley, supra, that a district court should not, by its remedial orders place itself in the position of a "de Facto legislative authority." Under Pennsylvania State law, petitioner City Council of the City of Philadelphia has the legislative prerogative to approve or disapprove proposed redevelopment contracts. Under 35 P.S. §1710(j) of the Pennsylvania Urban Redevelopment Law, the Redevelopment Authority (a State agency) may not execute a redevelopment contract unless City Council approves the terms of said contract and finds it to be in conformance with a previously passed redevelopment "proposal." After Petitioner City Council voted 11-5 to *disapprove* the proposed redevelopment contract, the District Court, through its January 11, 1979 Order in effect held said vote to be "null and void" and substituted its own decision with respect to the legislation question.

The lower court in effect "approved" the proposed redevelopment contract and ordered by injunctive decree that the Redevelopment Authority execute said contract. The District Court has wrongfully placed itself into the role of a "de facto legislature" for the City of Philadelphia. The Court ordered the execution of a Seven Million Dollar ($7,000,000) major development contract including the sale of 4½ acres of land *without ever reading or evaluating the disputed redevelopment contract*. The document was never submitted to the lower court on the record through any proceeding or pleading.

Without reading the disputed contract, the District Court had no basis whatsoever to make any ruling concerning this proposed contract. Ordering the execution of an "unseen" contract is a clear abuse by the District Court of its equitable powers and a wrongful intrusion into the legislative role of Petitioner City Council of the City of Philadelphia.

(C) THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN *HILLS v. GAUTREAUX*, 425 U.S. 284, 293, 306 47 L.Ed. 2d 792, 801, 96 S. Ct. 1538 (1976).

The decision of the district court as affirmed without opinion by the Third Circuit Court of Appeals is in direct conflict with the holding of this Court in *Hill v. Gautreaux* that there are fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. The power is not plenary and in fashioning a remedial decree the District Court must not displace the rights and powers accorded local government entities under federal and state housing statutes and existing land-use laws. It is clear the January 11, 1979 Order of the District Court herein "*displaces*" the rights and powers of Petitioner City Council pursuant to the Pennsylvania Urban Redevelopment Law, 35 P.S. §1710(j). While the District Court may have the equitable power to require that 120 units of low-income housing be developed in non-racially impacted neighborhoods, it is the legislative right and obligation of Petitioner City Council to approve or disapprove any proposed redevelopment contract and decide the location within said "*non-impacted*" areas to develop those 120 houses.

(D) THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISIONS IN *RIZZO v. GOODE*, 423 U.S. 362, 96 S. Ct. 598, 96 L.Ed. 2d 561, 607 (1976).

The decision of the district court is in direct conflict with the holding of this Court in *Rizzo v. Goode*, supra, that instructs the federal courts to be restrained by the principles of equity, comity and federalism where injunctive relief is sought against those in charge of the

executive and legislative branch of local government. The district court granted respondents Motion for Injunctive Relief without affording petitioners due process under the law. The Court refused to adhere to the mandate of the Federal Rules of Civil Procedure which require that an evidentiary hearing be held prior to the imposition of permanent injunctive relief. The Court granted Respondents' injunction motion without affording Petitioners a hearing or oral argument on the claims for injunctive relief. The District Court has breached the balance of power which separates the federal equitable powers from a state's administration of its own law.

(E) THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN *GRANNY GOOSE FOODS, INC. v. BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS*, 45 U.S. 423, 432, 39 L.Ed. 2d 435, 94 S. Ct. 1113 (1974).

The decision of the District Court is in direct conflict with the holding of this Court in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, supra, that an evidentiary hearing is required as a prerequisite to the issuance of an order for a preliminary or permanent injunction. Petitioners were never afforded an opportunity for an evidentiary hearing prior to the District Court's January 11, 1979 Order whereby Pennsylvania state law 35 P.S. §1710(j) was enjoined in addition to other permanent injunctive relief.

Petitioners are entitled to an evidentiary hearing where they could clearly defend the validity of City Council's Legislative Actions of December 21, 1978. The District Court's denial of a hearing also resulted in the Court's violation or non-compliance with several important Federal Rules of Civil Procedure including Rule 39b; 52a; 60b; 65a; and 65d.

POINT 3

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA AS TO THE EQUITABLE POWER OF THE COURTS TO PASS UPON THE MERITS OF A PROPOSED REDEVELOPMENT CONTRACT.

The decision of the District Court is in direct conflict with the holding of the Supreme Court of the State of Pennsylvania in *Schenck v. Pittsburgh, et al.*, 364 Pa. 31 (1950) 70 A.2d 612, that the Courts do not have the equitable power to pass upon the merits of a proposed redevelopment contract since, under the Pennsylvania Urban Redevelopment Law, only Petitioner City Council is empowered with the right and obligation to approve or reject a proposed redevelopment contract. The District Court's Order rendered "null and void" the December 21, 1978 legislative action of City Council and "deleted" (or totally removed) City Council from its legislative role under 35 P.S. §1710(j). The District Court has intruded into an area of *legislative* concern which has been declared by the Pennsylvania Supreme Court to be outside the jurisdictional powers of the Courts.

CONCLUSION

For the foregoing reasons, your Petitioners respectfully submit that a Writ of Certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MARK JURIKSON
Deputy City Solicitor
SHELDON L. ALBERT
City Solicitor

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Philadelphia, PA 19107
(215) MU 6-6205

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 1979, three copies of the Petition for Writ of Certiorari were hand delivered to:

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Assistant City Attorney
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Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
Attorney for Respondent HUD

Harold R. Berk, Esquire
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Attorneys for PHA

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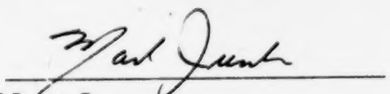
Philadelphia, Pennsylvania 19103

I further certify that all parties required to be served have been served.



MARK JURIKSON
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Counsel for Petitioner

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Philadelphia, Pa. 19107

Appendix

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RESIDENT ADVISORY BOARD, et al.	Civil Action
v.	
FRANK L. RIZZO, et al.	No. 71-1575

MEMORANDUM

BRODERICK, *J.* March 17, 1978.

For the reasons set forth in the Court's memorandum of March 9, 1978, a conference attended by counsel for all parties was held in chambers on March 10, 1978. The purpose of the conference, as announced in the March 9, 1978 memorandum, was to give the parties an opportunity to agree as to the procedures which each defendant should take to accomplish the construction and occupancy of the 120 townhouses at the earliest date.

At the conference, it was agreed that counsel for the Redevelopment Authority ("RDA"), the City of Philadelphia ("the City"), and the Resident Advisory Board ("RAB") would meet in an effort to arrive at an agreement concerning the necessary procedures and a time-schedule. Counsel for these defendants submitted to the Court on March 13, 1978 a proposal which set forth certain necessary procedures and a time-schedule. Counsel for all the other parties were given the opportunity to comment on the submitted proposal. The Court received comments from RAB, RDA, Philadelphia Housing Authority ("PHA") and the City, which comments contained objections to a few of the proposals.

The procedures and time-schedule agreed to by the parties, with all of the provisions objected to deleted, read as follows:

"1. The parties to this action shall make all good faith efforts to expedite implementation of the following procedures whereby a developer shall be obtained for the construction of the Whitman Townhouse Project.

"2. The dates which are specified herein for the completion of particular phases in the "developer-selection process" are to be adhered to. Should circumstances cause or necessitate any revision or extension of specified dates, the parties shall immediately report such information, in writing, to the Court and to counsel of record. Counsel for the parties shall have three (3) days from the time of written notification concerning a revision of a particular date to submit to this Court, in writing, any comments thereon. Adjustment of the specified dates may be made by this Court where necessary.

"3. Multicon Properties, Inc. ("MPI") shall, as soon as possible, but no later than March 17, 1978, by fee simple deed for a consideration of $1.00, convey to RDA title to the premises generally referred to as the Front and Oregon Site. MPI shall provide RDA with the following documents:

a. Certificate of Incorporation by Multicon Properties, Inc. (Ohio Corporation). Certified copy of resolution of Board of Directors (and approval of shareholders, if same is not in regular course of business) of grantor authorizing the execution and delivery of present Deed.

b. Certificate of Authority from the Department of State of the Commonwealth of Pennsylvania authorizing transacting of business in Pennsylvania by Multicon Properties, Inc. (Ohio Corporation).

c. Production of Certificate from the State of Incorporation showing that its charter is still in full force and effect and that same has not been revoked for non-payment of corporate taxes of Multicon Properties, Inc. (Ohio Corporation).

d. Taxes due the Commonwealth of Pennsylvania by Multicon Properties, Inc. (Ohio Corporation) (SEARCH ORDERED).

e. Financing Statement Terminations, suitable for filing with the Secretary of the Commonwealth, Prothonotary of Philadelphia County, the Recorder of Deeds of Philadelphia County, ending the Financing Statement of Provident National Bank, secured party and Multicon Properties, Inc., debtor, filed 11/9/70 in the Department of Records, #19852.

"4. MPI shall obtain the original drawings, specifications, and plans for the Whitman Townhouse Project from the architect, Trott and Bean of Columbus, Ohio, and deliver them to RDA by March 17, 1978.

"5. RDA shall prepare an advertisement for bids and proposal package for potential bidders for the construction of the Whitman Townhouse Project, based upon the original drawings, specifications and plans by April 3, 1978.

"6. HUD shall review and approve an acceptable advertisement for bids and proposal package by April 10, 1978. If HUD finds the advertisement or proposal package unacceptable, RDA and HUD shall negotiate and reach an agreement by April 10, 1978.

"7. RDA shall cause the advertisement for bids to be published at least twice each week for two consecu-

tive weeks in Philadelphia area newspapers and in national newspapers, including the New York Times and Washington Post, such advertisements to be completed by April 24, 1978.

"8. RDA, HUD and the City of Philadelphia shall take affirmative action to seek and obtain minority owned development companies to bid on this Project.

"9. Bids must be submitted to RDA no later than 2:00 p.m., June 9, 1978, at which time the bids will be opened.

"10. The Technical Evaluation Committee (composed of the Office of Housing and Community Development, City Planning Commission, Philadelphia Housing Development Corporation, Philadelphia Industrial Development Corporation and RDA) shall review all bids to determine which bidder demonstrates the best financial capability and ability to perform while also giving affirmative consideration to minority bidders. The Technical Evaluation Committee may consult with HUD, PHA, Whitman Area Improvement Council, and counsel for plaintiffs in making this determination. The determination of best bidder proposal shall be made by June 26, 1978.

"11. HUD shall perform a preliminary cost estimate for the construction of the Project based on the original drawings, plans and specifications by June 26, 1978.

"12. HUD shall negotiate with the selected bidder to determine the total price of construction together with all terms, and such negotiations shall be completed by agreement on total price and terms by September 18, 1978. HUD shall amend the Annual Contributions Contract with PHA to include the price negotiated with the bidder by September 18, 1978.

"13. The Boards of RDA and PHA shall pass resolutions approving the new redeveloper, the form of the Redevelopment Contract and Agreement of Sale, subject to HUD approval, by September 25, 1978.

"14. RDA shall, by October 2, 1978, prepare and present to City Council such documents as are necessary for the purpose of obtaining Councilmanic approval of the new redeveloper and the redevelopment contract.

"15. City Council shall expeditiously consider the new redeveloper and the redevelopment contract, and final action by Council in connection therewith shall be taken no later than November 9, 1978.

"16. In the event the Mayor is required to take action in connection with Councilmanic approval of the new redeveloper and the redevelopment contract, the Mayor shall take such action by November 19, 1978.

"17. HUD shall give its approval to the new redeveloper and redevelopment contract, and PHA, RDA and the new redeveloper shall execute the redevelopment contract and Agreement of Sale, together with all necessary documents, by November 23, 1978.

"18. The new redeveloper shall obtain construction financing by February 13, 1979. Settlement shall take place as soon as possible after the construction financing is obtained but no later than February 25, 1979.

"19. The City of Philadelphia shall waive the transfer tax on the transfer of the real property from MPI to RDA. RDA shall, if same is imposed, pay real estate transfer taxes to the Commonwealth of Pennsylvania.

"20. The City of Philadelphia shall provide such police protection as is needed to insure the completion of the 120 townhouses.

"21. The new redeveloper shall begin construction of the Whitman Townhouse Project as soon as practicable after settlement.

"22. The parties shall show compliance with each of the steps set out herein by filing with the Court and serving upon counsel for plaintiffs a copy of any and all documents which are executed, entered, adopted, or published in conformity with the steps set out, or where no such documents are created, by filing and serving such other proof of compliance with each step as may be appropriate and sufficient to show compliance with each step."

The Court has determined to accept the agreement of the parties (with all portions objected to deleted) as a specification of the necessary procedures and the time-schedule required to complete construction of the 120 townhouses, pursuant to the Court's Order of November 5, 1976.

In connection with those deleted portions of the agreement which concern real estate taxes, releases and possible expenses in connection with the drawings, specifications and plans, counsel for all parties are directed to make another attempt to arrive at an equitable solution to these few remaining problems, and counsel for the plaintiffs shall advise the Court on Monday, March 27, 1978 as to whether an agreement has been reached.

/s/ _____
RAYMOND J. BRODERICK, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RESIDENT ADVISORY BOARD et al.	Civil Action
v.	
FRANK L. RIZZO et al.	No. 71-1575

MEMORANDUM

Filed November 13, 1978

AND NOW, this 13th day of November, 1978, the Court having been advised of the difficulties experienced by the Philadelphia Housing Authority in meeting the schedule previously established, the procedures and schedules set forth in the Court's memorandum of March 17, 1978, as amended June 30, 1978, October 13, 1978, and November 3, 1978, shall be further amended as follows:

I. Paragraph 13 shall be amended to provide:

The Boards of RDA and PHA shall pass resolutions approving the new redeveloper, the form of the Redevelopment Contract, amendment of sale and the agreement of sale, subject to HUD approval by November 21, 1978.

A & R Development Corporation shall have until November 21, 1978 to reveal the identity of its general contractor.

II. Paragraph 14 shall be amended to provide:

RDA shall, by November 21, 1978, prepare and present to City Council such documents as are

necessary for the purpose of obtaining Councilmanic approval of the new redeveloper and the Redevelopment Contract.

III. Paragraph 15 shall be amended to provide:

City Council shall expeditiously consider the new redeveloper and the Redevelopment Contract, and final action by Council in connection therewith shall be taken no later than December 29, 1978.

IV. Paragraph 16 shall be amended to provide:

In the event the Mayor is required to take action in connection with Councilmanic approval of the new redeveloper and the Redevelopment Contract, the Mayor shall take such action by January 8, 1979.

V. Paragraph 17 shall be amended to provide:

HUD shall give its approval to the new redeveloper and Redevelopment Contract, and PHA, RDA and the new redeveloper shall execute the redevelopment contract and Agreement of Sale, together with all necessary documents, by January 15, 1979.

VI. Paragraph 18 shall be amended to provide:

Settlement shall take place no later than February 16, 1979.

In no other respects, however, is the memorandum of this Court dated March 17, 1978, and amended on June 30, 1978, October 13, 1978 and November 3, 1978, modified.

/s/ _____

RAYMOND J. BRODERICK, *J.*

RESOLUTION: DATED DECEMBER 21, 1978

Requesting the Redevelopment Authority of Philadelphia to prepare plans and select a redeveloper for the development of not less than 250 dwelling units on scattered sites within the Whitman Urban Renewal Area under certain terms and conditions.

WHEREAS, The Redevelopment Authority of Philadelphia has submitted a proposed ordinance for a redevelopment contract, specifying the construction of one hundred and twenty (120) units of low income housing at the cost of six million nine hundred and three thousand, seven hundred and thirty-eight ($6,903,738) dollars, and naming as a redeveloper the A and R Development Corporation/The Waterford Group, a Joint Venture; and

WHEREAS, The proposed ordinance was introduced into the Council on December 7, 1978, and after proper advertising, a public hearing, on the proposal was held on December 13, 1978; and

WHEREAS, At said public hearing lasting nine hours, established the following testimony:

1. That the houses to be built as a "Modified Turnkey III" Project would cost between $57,000 and $61,000 dollars each, this without the original cost of acquisition and demolition.

2. Expert testimony that the noise levels at the site exceed those levels determined by the U.S. Environmental Protection Agency to be hazardous to human health.

3. That a survey to satisfy the requirements of the National Environmental Policy Act (NEPA) was started by the Department of Housing and Urban Development and then cancelled before it was completed.

4. That no Turnkey III Project has been successful in the entire United States and that the 120 units could become a straight P.H.A. rental project, voiding the planned purpose of home ownership.

5. As of now, there are neither valid plans or workable financial proposals for a Modified Turnkey III Project.

6. There was testimony that the proposed redeveloper's qualifications and ability to fulfill the redevelopment contract were questionable.

7. That it was almost unanimous that rehabilitated units on scattered sites would better serve the interests of all of the citizens of Philadelphia and in particular the interests of low-income families and minorities.

8. That housing units on scattered sites would cost between fifteen and thirty thousand dollars each, allowing for the production of many more housing units and assist in renewing the Whitman area.

9. That many other neighborhoods throughout the City were against the development of projects such as proposed, but do favor a scattered site approach.

10. That applications, already taken by the "Whitman Council," for scattered site rehabilitated housing in the Whitman area resulted in 140 applicants, 70 for white families, 70 for minority families; and

WHEREAS, As elected representatives of the people of Philadelphia, the Council desires to do what it thinks is right for those people, while cooperating with the Federal Judiciary, for which it has the utmost respect; and

WHEREAS, Council continues to encourage the development of subsidized housing for non-elderly in

non-impacted areas and needs the cooperation of the U.S. Department of Housing and Urban Development to that end; and

WHEREAS, It is the express intent of City Council that the City of Philadelphia, through its officers and employees, shall administer all programs and activities relating to housing and urban development in a manner which affirmatively promotes fair and non-discriminatory housing; therefore

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That the Redevelopment Authority is hereby requested, when concurred in by the Federal Court, to prepare an ordinance, complete with plans, specifications, contract and any other necessary documents, for the development of not less than two hundred and fifty (250) units of housing for low-income persons, on scattered sites, in the Whitman Urban Renewal Area.

RESOLVED, That upon receipt of such documents together with approval and commitment for funding from the Department of Housing and Urban Development, the Council will consider and act upon same expeditiously; and City Council will direct all administrative agencies of the City having responsibilities to act on such matters to do so forthwith so that the development of housing units for low-income persons in the Whitman Urban Renewal Area may proceed.

RESOLVED, That certified copies of this Resolution shall be forwarded to the Federal Court for the Eastern District of Pennsylvania, the Mayor, the Philadelphia Housing Authority, the Philadelphia Redevelopment Authority, the Philadelphia Housing Authority, the Philadelphia Planning Commission, the Philadelphia Office of Housing and Community Development, and the United States Department of Housing and Urban Development.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RESIDENT ADVISORY BOARD et al.	Civil Action
v.	
FRANK L. RIZZO et al.	No. 71-1575

MEMORANDUM

BRODERICK, *J.* January 11, 1979

On December 21, 1978, the City Council of Philadelphia considered Bill No. 1706, entitled "An ordinance approving the redevelopment contract of the Redevelopment Authority of the City of Philadelphia for the redevelopment and urban renewal of a portion of Whitman Urban Renewal Area . . .". Bill No. 1706 failed to receive sufficient affirmative votes. On the same day, City Council passed a resolution "Requesting the Redevelopment Authority of Philadelphia to prepare plans and select a redeveloper for the development of not less than 250 dwelling units on scattered sites within the Whitman Urban Renewal Area under certain terms and conditions." This Court has considered plaintiffs' motion requesting, among other things, that this Court order the defendants, Philadelphia Housing Authority (PHA) and Philadelphia Redevelopment Authority (RDA), to execute by January 15, 1979 all necessary contracts and agreements with A & R Development Corp./The Waterford Group, Inc. The Department of Housing and Urban Development

(HUD) joined the plaintiffs in requesting such an Order. The defendant, City of Philadelphia, has opposed this motion and requests the Court to change the judgment order of November 5, 1976 to provide for scattered site housing instead of the townhouses. For the reasons hereinafter set forth, this Court has determined that plaintiffs' motion shall be granted and the motion of the defendant, City of Philadelphia, shall be denied. This means that the execution of the contract with the selected redeveloper, and all other steps necessary for the construction of the townhouses as planned, shall proceed immediately.

HISTORY OF LITIGATION

The history of this litigation has been recited in detail in prior opinions of this Court. A summary at this juncture should be helpful, however, in clarifying the issues, since a review of the transcript of the proceedings before City Council indicates that the real issues were somewhat clouded by the rhetoric of the hearing.

On November 5, 1976, this Court entered an order directing the PHA, the RDA and HUD to proceed immediately to construct the townhouses on the Whitman site. The Third Circuit Court of Appeals affirmed the order on August 31, 1977 and certiorari was denied by the United States Supreme Court on February 27, 1978. *Resident Advisory Board (RAB) v. Rizzo*, 425 F. Supp. 987 (E.D.Pa. 1976), *aff'd in relevant part*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, __ U.S. ___, 98 S.Ct. 1457 (1978); *Sworob v. Harris*, 451 F. Supp. 96 (E.D.Pa. 1978), *aff'd*, 578 F.2d 1376, *cert. denied*, __ U.S. ___ (January 8, 1979).

This litigation, which commenced in 1971, has been protracted and vigorously contested. The trial consumed 57 days, finally ending on January 21, 1976. Planning for this low income housing development commenced more than 20 years ago. The first of many public hearings took place on June 4, 1956. At this hearing, various sites were considered, and after hearing the views of the community, the Whitman site at Front and Oregon was selected and the site was approved by the Philadelphia City Planning Commission.

On February 18, 1957, HUD gave tentative approval to the Whitman site for the redevelopment of a public housing project. An annual contributions contract was executed by HUD on December 6, 1957, in the amount of $8,607,793, approving a development program for Whitman of 476 units and authorizing PHA to begin planning the Whitman project. Drawings for a high-rise public housing project at the Whitman site were submitted to HUD by PHA and were approved by HUD on August 29, 1959. Condemnation and acquisition of the site by PHA took place during 1959 and 1960, culminating with the award of demolition contracts on June 26, 1960. Local opposition developed to the placing of high-rise public housing in Whitman.

On October 27, 1963, RDA executed an application to establish the Whitman Urban Renewal Area. The application sought a federal grant of $3,311,024 and a temporary loan of $5,545,524 (totaling $8,856,548) to carry on the land acquisition, relocation of site residents, demolition and site clearance, site preparation, and rehabilitation or conservation required for the proposed Whitman Urban Renewal Area. The plan included clearing 130 homes, none of which were at the Whitman public housing site, and rehabilitating 2,500 other structures. The land use map for the Whitman Urban Renewal Area provided for public housing only on the Whitman site. The total amount of all governmental funds expended through RDA in the Whitman Urban Renewal Area from 1963 through 1975 has been $11,178,210.43; of this amount $6,682,686.92 has constituted federal funds from HUD. Between 1969 and 1973, 109 new homes were privately developed and sold for between $25,000 and $30,000, all of which were eligible for FHA-insured mortgages. From January 1, 1966 until May 1, 1975, Whitman residents, through RDA and with the aid of federal funds, have obtained $2,718,278 in loans and grants to rehabilitate their own homes. A total of 1,123 households, more than 25% of all houses in the Whitman area, have received funds from this program.

In 1964, after opposition had developed to the high-rise design of the proposed Whitman project, a special Act of Congress was passed, known as the Barrett Amendment. Pursuant to the Barrett Amendment, the design of the proposed Whitman project was changed from high-rise to low-rise construction. The

zoning of the Whitman site was changed by City Council in 1964 to permit the construction of low-rise public housing on the site. In late 1967, Hartsville Construction Company was chosen as the developer to build 114 units on the Whitman site. The community opposed certain aspects of the Hartsville plan and Hartsville refused to execute the contract. Because of the opposition to the Hartsville plan, a decision was made to look for a new developer.

A HUD Equal Opportunity staff review of the Whitman site was conducted and approval of the site for low income public housing was recommended on June 4, 1968. The Whitman site was described as being located in a predominantly all-white area,[1] conducive in all respects to Equal Opportunity Housing. Thereafter, HUD approved the Whitman site. The next year HUD established the Whitman project as a "balance" for the Morton Addition, a project located in a black area of Philadelphia. The Morton Addition was completed, and is now occupied, pursuant to the agreement to build the Whitman townhouses.

During the latter part of 1969, PHA and RDA advertised for developers for the Whitman site pursuant to all applicable regulations. Twelve developers responded, and on April 28, 1970, PHA chose Multicon as the developer, which choice was approved by HUD on May 20, 1970. The Multicon proposal was considered superior to all other proposals because it maintained existing street patterns and the housing was of the same design as the other houses in the Whitman area. The Whitman Park Townhouse Project was unique in design for public housing because each house was designed with street frontage and a separate entrance and could be individually plotted on a separate building

1. Indeed, in 1950, 46% of the families living on the Whitman site were black, making the area an integrated section of Philadelphia.

lot. This design was in anticipation of a federal program called Turnkey III, which called for a lease-purchase agreement pursuant to which the public housing tenant could eventually become the owner of his own home.

On July 14,1970, RDA and Multicon entered into an agreement of sale to enable Multicon to obtain the land at Front and Oregon and build the Whitman Park Townhouse Project. On October 27, 1970, Mayor Tate signed an ordinance passed by City Council approving Multicon as the developer of the project. On October 29, 1970, based upon appropriate HUD approval of the project, PHA and Multicon entered into an agreement of sale whereby Multicon was to construct 120 townhouses on the Whitman site. On October 30, 1970, RDA conveyed title to the Whitman Park Townhouse Project site to Multicon.

Prior to the signing of the contracts with Multicon, the community was involved in numerous meetings and correspondence with RDA, PHA and Multicon. On June 2, 1970, a meeting was held in the Whitman community attended by officials from RDA, PHA, Multicon and the Mayor's office. The meeting was held to give the community an opportunity to closely review the Multicon plans for the Whitman Park Townhouse Project. The community made several suggestions in connection with the building materials to be used in the project and fire safety for the completed townhouses. The suggestions were accepted and appropriate changes were made in the Whitman Park Townhouse Project plans. Also, the home ownership potential and the advantages thereof of a public housing development under Turnkey III were explained to the community. Community representatives stated after the June 2, 1970 meeting that the Whitman Park Townhouse Project plans "look excellent", that they were "very impressed with the plans" and felt that the houses would be "an asset to our community."

Although a groundbreaking ceremony was conducted on December 16, 1970, actual construction did not commence until March of 1971. As a result of the activities by demonstrators at the site, the builder was unable to proceed with construction since requested police protection was not forthcoming. At a conference on April 30, 1971, the City Managing Director stated that Multicon would not receive police assistance.

Shortly thereafter, there was a series of meetings and various changes in the Whitman Park Townhouse Project were proposed in order to settle the controversy, including opening a building in the project as a community recreation area, reserving 50% of the units for persons who were displaced by the clearance for the Whitman project, raising the income levels of those persons who would be eligible for the project and setting up a screening committee, which would include Whitman residents, to assure that those living in the houses would be an asset to the community. On May 17, 1971, after full discussion and consideration of the settlement proposals, the community voted down the final settlement offer of PHA. On May 18, 1971, Mayor Rizzo was nominated as the candidate for Mayor. On May 20, 1971, the Managing Director of Philadelphia again stated that the City would not provide police assistance for Multicon should it return to work, and the Chairman of PHA stated that he had been instructed by the Mayor to order Multicon not to resume work.

After he took office in January of 1972, Mayor Rizzo told the Chairman of PHA that because of the promise he had made to the people in the Whitman area, he did not want the Whitman Park Townhouse Project to proceed. The efforts of the builder to proceed with construction were finally terminated by the City paying the builder $806,000 to cancel the construction contract.

In referring to this Court's judgment order dated November 5, 1976, our Third Circuit Court of Appeals stated:

> . . . the court found that the City had violated the Civil Rights Act of 1866 (42 U.S.C. §§1981 & 1982) and the Thirteenth and Fourteenth Amendments because the actions of the City had a racially discriminatory impact and were taken with a discriminatory purpose or motivation. 425 F. Supp. at 1024, 1025. We conclude, as did the district court, that the City violated §1981 and §1982 by depriving plaintiffs of constitutional rights guaranteed by the Thirteenth and Fourteenth Amendments.
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> * * *
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> . . . The district court held that the City had acted with racially discriminatory intent, as evidenced by: (1) the City's joining in opposition to the Whitman Townhouse project with knowledge that some of that opposition was racially motivated; (2) Mayor Rizzo's explicit statements equating "public housing" with "Black housing" and his public stand "against placing such housing in White neighborhoods"; and (3) the City's taking steps to terminate the project with knowledge that the action would produce a racially discriminatory effect. 425 F. Supp. at 1025.

As for the actual consequences of the failure to construct the Whitman Townhouse project, the district court found the following effects of termination:

> The cancellation of the Whitman Park Townhouse Project had a racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia. The waiting list for low-income public housing in Philadelphia is composed primarily of racial minorities. Of the

> 14,000 to 15,000 people on the waiting list for public housing in Philadelphia (N.T. 56-84), 85% are Black, and 95% are considered to be of racial minority background. (N.T. 40-103). Obviously those in housing projects, which are overwhelmingly Black, and those on the public housing waiting list, are those least able to move out of the poorer, racially impacted areas of Philadelphia. The evidence also established that Blacks in Philadelphia who are concentrated in the three major Black areas of Philadelphia, have the lowest median income in comparison with the total population of Philadelphia and live in the poorest housing in Philadelphia. The Whitman Park Townhouse Project was a unique opportunity for these Blacks living in racially impacted areas of Philadelphia to live in an integrated, nonracially impacted neighborhood in futherance of the national policy enunciated in Title VIII of the Civil Rights Act of 1968. Public housing offers the only opportunity for these people, the lowest income Black households, to live outside of Black residential areas of Philadelphia. Cancellation of the project erased that opportunity and contributed to the maintenance of segregated housing in Philadelphia.

425 F. Supp. at 1018. This discriminatory effect and the invidious discriminatory purpose underlying the City's role in the project's termination together were found to establish a constitutional violation under *Washington v. Davis*.

* * *

To remedy Philadelphia's violation of plaintiffs' constitutional rights, the district court ordered that the City take "all necessary steps for the construction of " and enjoined the City from interfering with, the Whitman project. 425 F. Supp. at 1029. We recognize that once a violation is found, "[t]he task is to correct, by balancing of the individual and collective interests, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Notwithstanding the Supreme Court's observation in *Swann* that "the scope of a district court's equitable powers to remedy past wrongs is broad", *id.* at 15, the Supreme Court has in recent equal protection cases given careful scrutiny to the choice of remedy to assure that the relief granted is no broader than that necessary to remove the violation and its effects. *E.g., Dayton Board of Education v. Brinkman*, ___ U.S. ___, ___, 97 S.Ct. 2766, 53 L.Ed. 2d 851 (1977). *See also Rizzo v. Goode*, 423 U.S. 362, 377 (1976). "Once a constitutional violation is found, a federal court is required to tailor 'the scope of a remedy' to fit 'the nature of the violation,' " *Brinkman, supra*, U.S. at ___, 97 S.Ct. [2766] at 2775. In short, the federal equitable remedy must cure the constitutional defect but the dosage must not exceed that necessary to effect the cure.

Here, the injunctive relief decreed by the district court is directly responsive to and seeks to "cure" the violation proved, which arose with the City's resistance to, and obstruction of, the Whitman Townhouse project.

* * *

In sum, therefore, it is apparent that by their actions PHA and RDA were responsible for making unavailable or denying housing, within the meaning of §3604(a), to black families who otherwise would be living in Whitman. This discriminatory effect has not been justified under any standard, and the record bears out the need for, and propriety

of, the relief granted by the district court with respect to the Whitman project.

> We need comment only briefly on the form of the relief afforded by the district court in this respect. The district court was modest and conservative in the manner in which it corrected the statutory violation. Having no desire to become Philadelphia's "housing czar", *see* 425 F. Supp. at 1026, the district court required only that the construction of the Whitman project proceed as planned without futher interference. In so providing, the district court did not venture outside the permissible boundaries of constitutional and statutory precepts.

564 F.2d at 140-50 (footnotes and citations omitted).

CITY COUNCIL CANNOT ABROGATE THE COURT'S DECISION

The recent happenings in the City Council of Philadelphia cannot interfere with the November 5, 1976 judgment of this Court, as affirmed by the Third Circuit Court of Appeals, concerning which certiorari was denied by the Supreme Court of the United States, which judgment ordered the construction of townhouses on the Whitman Park site. Should there come a day when the Council of a city, by a majority vote of its members, can overturn or obstruct a decision of the federal judiciary holding that the rights of a minority in the city were violated by the actions of city government, it would mean that the elected body of a city could effectively abrogate those inalienable rights guaranteed to all of us in the Constitution. It would mean that the judicial system of this nation, established pursuant to Article III of the Constitution, a judicial system upon which this nation has come to rely in times of crisis, would be without the power to enforce its decrees and would crumble. Fortunately, ours is a nation committed to the rule of law and our elected representatives are not above the law. It must be so under our Constitution, which guarantees rights to individuals, rights which cannot be destroyed by the democratically determined actions of the majority. It follows, therefore, that, although federal judicial decisions do frequently incur the wrath of the majority, under our tripartite constitutional form of government, such decisions are the law of the land and cannot be abrogated by legislative action. It is beyond question that legislative action cannot negate a Constitutionally based judicial decision. As the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 490-91, 86 S.Ct. 1602, 1636 (1966), stated:

> Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

And as more recently reiterated by the Supreme Court in *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 1286 (1971): "[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees."

Ten days after the United States Supreme Court denied certiorari in *RAB v. Rizzo*, this Court, in a memorandum dated March 9, 1978, announced that before proceeding further with a contempt hearing against certain defendants, it would hold a meeting with all counsel in the case in an effort to have the parties agree concerning the procedures which each defendant should take in order to accomplish construction of the townhouses at the earliest date. As a result of this meeting, certain procedures were agreed to by the parties, including the following which were incor-

porated in this Court's memorandum of March 17, 1978:

> 10. The Technical Evaluation Committee (composed of the Office of Housing and Community Development, City Planning Commission, Philadelphia Housing Development Corporation, Philadelphia Industrial Development Corporation and RDA) shall review all bids to determine which bidder demonstrates the best financial capability and ability to perform while also giving affirmative consideration to minority bidders. The Technical Evaluation Committee may consult with HUD, PHA, Whitman Area Improvement Council, and counsel for plaintiffs in making this determination. The determination of best bidder proposal shall be made by June 26, 1978.
>
> 13. The Boards of RDA and PHA shall pass resolutions approving the new redeveloper, the form of the Redevelopment Contract and Agreement of Sale, subject to HUD approval, by September 25, 1978.
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> 14. RDA shall, by October 2, 1978, prepare and present to City Council such documents as are necessary for the purpose of obtaining Councilmanic approval of the new redeveloper and the Redevelopment Contract.
>
> 15. City Council shall expeditiously consider the new redeveloper and the Redevelopment Contract, and final action by Council in connection therewith shall be taken no later than November 9, 1978.
>
> 16. In the event the Mayor is required to take action in connection with Councilmanic approval of the new redeveloper and the Redevelopment Contract, the Mayor shall take such action by November 19, 1978.

The Court, in its memorandum of March 17, 1978, concluded as follows:

> The Court has determined to accept the agreement of the parties (with all portions objected to deleted) as a specification of the necessary procedures and the time-schedule required to complete construction of the 120 townhouses, pursuant to the Court's Order of November 5, 1976..

Thus, the Court, desiring to enforce its injunctive order without resort to contempt proceedings, accepted the agreement made by the defendants, including the City of Philadelphia, that City Council can be given the opportunity to determine for itself that the contract with the new redeveloper was in conformity with the plan it had approved for the Whitman site on October 27, 1970. In the opinion of this Court, 35 P.S. §1710(j)[2] did not require the contract to be submitted to City Council for its approval, since the Court's Order of November 5, 1976 specifically provided that the townhouses were to be constructed in accordance with the plans which had been approved by City Council on October 27, 1970. In any event, the law is clear that this Court, for the purpose of remedying the Constitutional violations, has the power to suspend the operation of

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2. 35 P.S. §1710(j) provides:

> The redevelopment proposal may contain the form of the redevelopment contract with the redeveloper selected and upon approval by the governing body of the proposal, as hereinbefore provided, the Authority is authorized to execute the said redevelopment contract. If the proposal does not contain the form of the redevelopment contract with the redeveloper selected, the Authority shall not execute a redevelopment contract with a redeveloper thereafter selected, until the said redevelopment contract shall have been approved by the governing body and found to be in substantial conformity with the proposal theretofore approved by the governing body. No additional public hearing notice or publication shall be required with respect to such approval.

such a statute. In a somewhat similar situation, the United States District Court bypassed the Chicago City Council, and the Seventh Circuit on appeal stated: "The district court had undoubted power to suspend the operation of the state statute." *Gautreaux v. Chicago*, 480 F.2d 210, 214 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974).

A review of the Notes of Testimony taken at the public hearing before City Council reveals a climate of confusion and misunderstanding. City Council did not consider whether the contract with the new redeveloper was in conformity with the plan it had approved. Instead, the desirability of building townhouses on the Whitman site was considered. That decision was made many years ago — *not by this Court*, but by federal, state, and city authorities, with the approval of City Council, pursuant to an Act of Congress specially sponsored by the late Congressman Barrett at the request of his constituents from the Whitman area.

The Law Department of the City has filed with this Court a copy of a resolution passed by Council concerning the development of scattered site housing in the Whitman Urban Renewal Area. The City has filed a motion, pursuant to Fed.R.Civ.P. 60(b)(5) and (6), to amend the Court's judgment order of November 5, 1976 — an order affirmed by the Third Circuit Court of Appeals concerning which certiorari has been denied by the Supreme Court of the United States. A court lacks the power to modify in any material respect its judgment which has been affirmed, in relevant part, by the Court of Appeals. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039 (1948); *Ratay v. Lincoln Nat'l Life Ins. Co.*, 405 F.2d 286 (3d Cir. 1968). A court may, however, grant relief from such a judgment, if the requirements of Rule 60 are satisfied; this is a matter for the district court to determine. *Standard Oil Co. of California v. U.S.*, 427 U.S. 17, 97 S.Ct. 31 (1976). This Court finds that the City has failed to present any reason sufficient to justify relief from the operation of the judgment of this Court entered November 5, 1976.

Furthermore, the policy decision as to whether to build a high-rise or townhouses, or to rehabilitate old houses, was not then, and is not now, a matter for judicial determination by this Court. This issue was adjudicated in this Court's opinion of November 5, 1976. *See RAB v. Rizzo*, 425 F. Supp. at 1027. The doctrine of res judicata is therefore another reason barring further consideration by this Court of scattered site housing as a substitute for the townhouses. *Hubicki v. ACF Industries*, 484 F.2d 519, 524 (3d Cir. 1973). The approval of this Court is obviously not necessary should the appropriate authorities desire to rehabilitate houses in the Whitman area, it being understood, of course, that such rehabilitation of houses in the Whitman Urban Renewal Area shall in no way interfere with this Court's order concerning the construction of the 120 townhouses on the Whitman site.

The proposed contract with the new redeveloper reveals that the cost of construction of the townhouses will be substantially higher than the original contract that was cancelled by the City. This Court understands that many, including City Council, are concerned with the increased cost of the townhouses, an increase caused by inflation, and possibly by the fears or pressures which may have inhibited local builders from participating in the bidding. In addition to the increased cost of the houses themselves, there is, of course, the $806,000 paid by the City to the original builder in cancellation of the original construction contract. Although the question of who should finally bear these increased costs brought about by discriminatory acts in violation of the Constitution has not been presented to this Court, it is a matter which may deserve the Court's consideration at some future time.

There is no question that the federal court has the power to enforce its decisions, and in matters such as this where the judgment of the Court has mandated that certain actions be taken by the parties, enforcement of such orders is often brought about by holding the recalcitrant party in contempt, which often means a fine and/or imprisonment. So far, the Court has not found it necessary to resort to contempt proceedings and will do so only when it becomes necessary to the enforcement of the judgment.

Accordingly, the townhouses shall be constructed as ordered by this Court on November 5, 1976 and the Court's memorandum of March 17, 1978, amended June 30, 1978, October 13, 1978, November 3, 1978, and November 13, 1978, shall be further amended as follows:

Paragraph 17 shall be amended to provide:

17. HUD shall give its approval to the new redeveloper, A & R Development Corp./The Waterford Group, Inc., and Redevelopment Contract, and PHA, RDA and the A & R Development Corp./The Waterford Group, Inc. shall execute the Redevelopment Contract and Agreement of Sale, together with all necessary documents on or before January 19, 1979.

Paragraph 18 shall be amended to provide:

18. Settlement shall take place on or before February 9, 1979.

Paragraphs 15 and 16 of this Court's memorandum will be considered as deleted for the reasons herein set forth.

/S/ _____

RAYMOND J. BRODERICK, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

January 18, 1979

No. 79-1081

RESIDENT ADVISARY BOARD, et al.

v.

FRANK L. RIZZO, et al.

City Council of the City of Philadelphia
and all other Municipal Defendants,
Appellants,

(D.C. Civil No. 71-1575)
(See attached sheet for complete caption)

Present: WEIS and MARIS, *Circuit Judges.*

1. Appellants' motion to stay the January 11, 1979 order of the District Court for the Eastern District of Pennsylvania pending appeal, *with* Memorandum of Law in support of motion, and attachments,
2. Motion by appellee, Resident Advisory Board, to expedite briefing and disposition on the merits, in which it states joined by the United States Department of Housing and Urban Development, as follows:
   (a) appellants' brief to be hand filed and served by January 22, 1979
   (b) appellees' brief(s) to be hand filed and served by January 26, 1979

(c) appellants' reply brief to be hand filed and served by January 19, 1979

in the above-entitled case.

Respectfully,

/s/ _____
THOMAS F. QUINN, ESQ., *Clerk*

enc.
kg

The foregoing Motion to stay the January 11, 1979 order of the District Court is granted. The parties are directed to abide by the briefing schedule set forth herewith:

1. Appellants to hand-file and hand-serve an original and six (6) copies of brief in legible typewritten photostatic form, no later than January 26, 1979;
2. Appellants to hand-file and hand-serve an original and three (3) copies of the appendix in legible typewritten photostatic form no later than January 26, 1979;
3. Appellees are to hand-file and hand-serve an original and six (6) copies of their brief in legible typewritten photostatic form, no later than February 2, 1979;
4. Appellants may, if they so desire, hand-file and hand-serve an original and six (6) copies of reply brief no later than February 7, 1979; and

It is further ORDERED that this case be listed for disposition on the merits during the week of February 20, 1979.

By the Court,

/s/ _____
Circuit Judge

Dated: January 19, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1082

RESIDENT ADVISORY BOARD by ROSE WYLIE, Trustee ad litem, 1310 Arch Street, Philadelphia, Pennsylvania, and

HOUSING TASK FORCE OF THE PHILADELPHIA URBAN COALITION by SHIRLEY DENNIS and JOSEPH MILLER, Trustees ad litem, 1512 Walnut Street, Philadelphia, Pennsylvania, and

ESTHER SIERRA MENDEZ, individually and as guardian ad litem for her children, Carmelo, Mariel and Juanita, 1811 North 17th Street, Philadelphia, Pennsylvania, and

JEAN THOMAS, individually and as guardian ad litem for her children, Cheryl, James, Kevin and Byris Thomas, 3855 Mt. Vernon Street, Philadelphia, Pennsylvania, and

MABLE SMITH, individually and as guardian ad litem for her children, Jerome, Vanessa and Janice Smith, 2429 North 27th Street, Philadelphia, Pennsylvania, and

BERNICE DEVINE, individually and on behalf of her children, Robert, Linda and Arthur Devine, Apt. 809-C, Warnock Place, Richard Allen Homes, Philadelphia, Pennsylvania, on their own behalf

and on behalf of all persons on the waiting list for public housing in the City of Philadelphia,

v.

FRANK RIZZO, individually and in his capacity as Mayor of Philadelphia, City Hall, Philadelphia, Pennsylvania, and

HILLEL LEVINSON, individually and in his capacity as Managing Director of the City of Philadelphia, Municipal Services Building, Philadelphia, Pennsylvania, and

JAMES H. J. TATE, individually, and

FRED T. CORLETO, individually, and

MULTICON CONSTRUCTION CORP., 4642 Executive Drive, Columbus, Ohio, and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, City Hall Annex, Philadelphia, Pennsylvania,

Defendants,

WHITMAN AREA IMPROVEMENT COUNCIL, ALICE MOORE, FRED DRUDING, and ALL MEMBERS OF WHITMAN AREA IMPROVEMENT COUNCIL AND ITS OFFICERS, AGENTS, SERVANTS, REPRESENTATIVES and EMPLOYEES, and ALL OTHER PERSONS ACTING ON CONCERT WITH THEM OR OTHERWISE PARTICIPATING IN THEIR AID,

Defendant-Intervenors.

PHILADELPHIA HOUSING AUTHORITY, 2012 Chestnut Street, Philadelphia, Pennsylvania, and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, City Hall Annex, Philadelphia, and

RUSSELL BYERS, individually and as Regional Administrator of the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania, and

CARLA A. HILLS, individually and as Secretary of the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania, and

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Curtis Building, Philadelphia, Pennsylvania,

Third Party Defendant,

CITY COUNCIL OF THE CITY OF PHILADELPHIA and all other Municipal Defendants,

Appellants

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 71-1575

Argued February 22, 1979

Before HUNTER, WEIS, *Circuit Judges*, and MARKEY,* *Customs and Patent Appeals Judge*

---

* *Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants,

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

JAMES HUNTER, III, *Circuit Judge*

Attest:

THOMAS F. QUINN, *Clerk*

Date: March 7, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1082

RESIDENT ADVISORY BOARD by ROSE WYLIE, Trustee ad litem, et al.

v.

FRANK RIZZO, Individually and in his capacity as Mayor of Philadelphia, et al.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by

Municipal Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III, *Judge*

Dated: April 2, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1082

RESIDENT ADVISORY BOARD, et al.

vs.

FRANK L. RIZZO, et al.

City Council of the City of Philadelphia and all other Municipal Defendants,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 9, 1979.

JAMES HUNTER, III
Circuit Judge

Dated: April 9, 1979

THE PENNSYLVANIA URBAN REDEVELOPMENT LAW
(35 Purdens' Statutes § 1710(J))

35 P.S. § 1710. Preparation and adoption of redevelopment proposal

(j) The redevelopment proposal may contain the form of the redevelopment contract with the Redeveloper selected and upon approval by the governing body of the proposal, as hereinbefore provided, the Authority is authorized to execute the said redevelopment contract. If the proposal does not contain the form of the redevelopment contract with the redeveloper selected, the Authority shall not execute a redevelopment contract with a redeveloper thereafter selected, until the said redevelopment contract shall have been approved by the governing body and found to be in substantial conformity with the proposal theretofore approved by the governing body. No additional public hearing notice or publication shall be required with respect to such approval.

1945, May 24, P.L. 991 § 10. As amended 1955, May 31, P.L. 107 §§ 1-3; 1968, June, P.L. 263, No. 125, § 12.

DOCUMENTS CONCERNING IMPLEMENTATION ORDERS OF DISTRICT COURT

Date	Document, Provision and Record with Respect to City Council
March 6, 1978	'Plaintiffs' Proposed Implementation Order' No provision as to City Council. R96-99
March 8, 1978	'Defendant, RDA's Proposed Implementation Order' City Council mentioned in paragraph #14 as follows: "RDA shall prepare an Ordinance for Introduction to City Council for the purpose of having the new Redeveloper and Redevelopment Contract approved by October 30, 1978." — No provision as to time period for City Council to consider or act upon Redevelopment Contract or Redeveloper. R120-125
March 8, 1978	Letter from Municipal Defendants' to District Court containing Objections to Plaintiffs' Proposed Order and reasons why City Council approval of Redevelopment contract is necessary and mandated under State law. R126-129
March 8, 1978	Letter from Defendant, RDA stating Objections to Plaintiffs' Proposed Order and stating that procedure for Development of Project must include approval of Redevelopment Contracts by City Council. R108-111
March 13, 1978	'Defendant RDA's 2nd Implementation Order' Provides in Paragraph #15 for consideration and vote by City Council on

Date	Document, Provision and Record with Respect to City Council
	Proposed Redevelopment Contract and Redeveloper. R138-145
March 17, 1978	*'Memorandum and Order of the District Court dated March 17, 1978' (Original Implementation Order)* Paragraph #15 provides: "15. City Council shall expeditiously consider the new redeveloper and the redevelopment contract, and final action by Council in connection therewith shall be taken no later than November 9, 1978." R146-152
June 30, 1978	*'Memorandum and Order of the District Court dated June 30, 1978'* (Amending March 17, 1978 Order) Contains same Paragraph #15 as March 17, 1978 Order (See above) R153-154
Sept. 15, 1978	'Defendant, HUD's Proposed Amended Implementation Order' Proposed shortening the five (5) week time period originally allotted to City Council for consideration and final action on Redevelopment Contract. R155-158
Oct. 13, 1978	*'Memorandum and Order of District Court dated October 13, 1978'* (2nd Amendment to March 17, 1978 Implementation Order) Contains same Paragraph #15 as March 17, 1978 Order except for Modification of date for final action by City Council from November 9, 1978 to December 18, 1978. R159-161
Oct. 26, 1978	Letter from Plaintiffs requesting Modification of March 17, 1978 Implementation Order, as Amended, to provide that City Council must *carry out* its obligation under Paragraph #15 of the Court's Order without, however, the name of the proposed Redevelopers' Contractor. R162-163

Date	Document, Provision and Record with Respect to City Council
Nov. 3, 1978	*Memorandum and Order of District Court dated November 3, 1978.* (3rd Amendment to March 17, 1978 Implementation Order) Contains same Paragraph #15 as Oct. 13, 1978 Order — Court orders developer to reveal identity of its contractor prior to City Council's consideration of Redevelopment Contract. R164-165
Nov. 13, 1978	*Memorandum and Order of District Court dated November 13, 1978* (4th Amendment to March 17, 1978 Implementation Order) Contains same Paragraph #15 as Nov. 3, 1978 Order except for modification of date for final action by City Council from Dec. 18, 1978 to Dec. 29, 1978. R166-167
Nov. 21, 1978	Redevelopment Contract Bill No. 1706, submitted by RDA to City Council. R168-251
Dec. 13, 1978	Public Hearing by City Council Rules Committee on Bill #1706.
Dec. 21, 1978	Debate and *vote by City Council Disapproving Bill No. 1706* containing the Proposed Redevelopment Contract. Vote: 11 to 5 to Disapprove the Redevelopment Contract and Redeveloper.

Date	Document, Provision and Record with Respect to City Council
Dec. 21, 1978	City Council passes *Resolution of Dec. 21, 1978, providing framework for development of 250 Scattered-Site Low income Houses.* Resolution provides for development of over twice as many houses as the *Townhouse* Project would have included. R252-254
Dec. 21, 1978	'Plaintiffs Motion to Suspend Operation of 35 P.S. #1710 . . .' R255-266
Dec. 28, 1978	"Municipal Defendants Memorandum of Law in Opposition to Plaintiffs' Motion to Suspend 35 P.S. #1710 . . ." R267-300
Dec. 28, 1978	Municipal Defendants' Motion for Modification of the Nov. 5, 1976 and March 17, 1978 Orders of the District Court, as Amended. R301-314
* * *	
Jan. 11, 1979 Order subject of this Appeal	*'Memorandum and Order of District Court of Jan. 11, 1979,'* (5th Amendment to March 17, 1978 Implementation Order) Deleted Paragraph #15 and #16 from Order — suspended operation of 35 P.S. #1710 and removed City Council from its legislative role pursuant to Pennsylvania State Law. R320-335

CITY OF PHILADELPHIA
WHITMAN NOISE STUDY

Prepared for:

CITY OF PHILADELPHIA
LAW DEPARTMENT
201 CITY HALL
PHILADELPHIA, PA. 19107

Prepared by:

DAMES & MOORE
6 COMMERCE DRIVE
CRANFORD, N.J. 07016

December 8, 1978

December 8, 1978

City of Philadelphia
Law Department
201 City Hall
Philadelphia, Pa. 19107

Attention: Mr. M. Jurikson
Deputy City Solicitor

Gentlemen:

Re: Whitman Site

Dames & Moore is pleased to submit this report of our findings regarding the applicability, from a community noise standpoint, of the Whitman Site (bounded by Oregon, Front, Porter and the rear yards of homes on 2nd Street) for the construction of residences. Dames & Moore investigated the sound quality of the referenced site both from an analytical basis using the

federal Housing and Urban Development (HUD) Noise Assessment Guidelines and from an environmental sound level measurement program. The environmental sound level measurement program was conducted under Dames & Moore's direction.

SUMMARY

Portions of the Whitman site are unacceptable for residential development. Use of HUD criteria (HUD Circular 1390.2) indicates that much of the land bounded by Oregon Avenue, Front Street, Shunk Street and the rear yards of the homes on 2nd Street are in the "Normally Unacceptable" category. Sound level measurements confirm this analysis.

The sound level data also indicate that environmental sound levels (L_{dn}) identified by the federal Environmental Protection Agency (EPA) as requisite to protect public health and welfare are exceeded throughout the site. Portions of the site have present sound levels ($L_{eq(24)}$) which exceed EPA's identified sound level requisite to prevent *hearing damage* risk. Sound levels at the southern portion of the site exceed EPA's *immediate* community noise level goal of a reduction of community noise to below L_{dn} = 75 dB. Other portions of the site exceed EPA's *short term* goal of a reduction of community noise to below L_{dn} = 65 dB.

The southern portion of the site bounded by Oregon, Front, Shunk, and the 2nd Street rear yards should not be used for residential housing without noise mitigation. Some alternatives to the proposed plan are:

1. Construction of a continuous two-story commercial/light industrial building along Oregon Avenue and Front Street (to Shunk Street) to act as a noise barrier for homes built on the remaining property.
2. Recreational/Parking for the southern section and higher density residential for the northern section.

3. Extensive architectural redesign for all buildings exposed to unacceptable noise levels to ensure that interior building sound levels meet HUD interior sound level criteria.*

INTRODUCTION

The U.S. Department of Housing and Urban Development, in an effort to provide decent housing and a suitable living environment, has published guidelines for the assessment of noise as a major source of environmental pollution. An evaluation of the site's potential for residential use is accomplished by assessing the effect of three major sources of noise; Aircraft, Roadways, and Railways. The evaluation of these three noise sources results in a composite rating of the site's exposure to noise pollution. These ratings are as follows:

Clearly Acceptable

The noise exposure is such that both the indoor and outdoor environments are pleasant.

Normally Acceptable

The noise exposure is great enough to be of some concern but common building constructions will make the indoor environment acceptable, even for sleeping quarters, and the outdoor environment will be reasonably pleasant for recreation and play.

Normally Unacceptable

The noise exposure is significantly more severe so that unusual and costly building constructions are necessary to ensure some tranquility indoors, and barriers must be erected between the site and prominent noise sources to make the outdoor environment tolerable.

---

*HUD Circular 1390.2.

Clearly Unacceptable

The noise exposure at the site is so severe that the construction costs to make the indoor environment acceptable would be prohibitive and the outdoor environment would still be intolerable.

Dames & Moore independently assessed the suitability of the Whitman Site for residential development using HUD guidelines [HUD Noise Assessment Guidelines — T. Schultz and N. McMahon BBN Report No. 2176 August 1971, and HUD Circular 1390.2]. Data were obtained from City of Philadelphia traffic control staff, visits to the site, and an extensive noise measurement program (discussed later in this report). The following is a summary of the results of this assessment.

Aircraft Noise

There are three airports within 15 miles of the proposed site location:

Philadelphia International Airport — 5 miles
North Philadelphia Airport — 15 miles
Moorestown Field — 12½ miles

Upon investigation of these airports, it was found that Moorestown Field in Moorestown, N.J., has been closed within the last year or two. No NEF (Noise Exposure Forecast) contours have been developed for North Philadelphia Airport.[1] However, air traffic control information for North Philadelphia indicates an average number of operations at 600 flights per day. Considering worst case, the airport still has a composite rating of "Normally Acceptable."

Philadelphia International Airport NEF contours have not been provided as of this date. From site observations, it appears that aircraft overflights do not significantly affect site noise. The assumed category is "Normally Acceptable."

1. Reference: Mr. Korzenouski, Engineer for Philadelphia International Airport.

Roadway Noise (Street Traffic)

There are five local streets and one main highway that contribute to traffic noise at the Whitman Site (see Figure 1). Calculations developed from traffic data in Table 1 are presented in Table 1. The following composite ratings are developed from the HUD Guidelines for the site.

Street	Boundary of Property	Acceptability Category Autos	Trucks
Oregon Avenue	North	Norm. Unacc.	Norm. Unacc.
Front Street	East	Norm. Unacc	Norm. Acc.
2nd Street	West	Norm. Acc.	Norm. Acc.
Porter Street	South	Norm. Acc.	Norm. Acc.
Shunk Street	Cut Thru	Norm. Acc.	Norm. Acc.

The calculation details are shown in Figure 2 and Figure 3.

Highway noise is emitted to the proposed site by Interstate 95 which is elevated (37 ft.) and is about 475 ft. to the east of the proposed site's eastern boundary. Highway traffic data for design year 1990 was provided by the City of Philadelphia, Department of Air Management Services, and is listed below:

Interstate 95 — Design Year 1990

	Southbound	*Northbound*
Average Daily Traffic (ADT)	29,900	37,900
Peak hour volume	9%	9%
Peak hour truck volume	7%	7%
Daily average truck volume	10%	10%

The HUD Noise Assessment Guidelines (graphs) indicate that the site's noise from I95 is "Normally Unacceptable" for both automobile and truck traffic. The calculation details are shown in Figure 2 and 3.

Railroad Noise

A north-south railroad line is located at a distance of about 660 ft. east of the proposed site. Using worst case analysis, this railroad line provides a HUD composite acceptability rating of "Normally Acceptable."

AMBIENT SOUND MEASUREMENTS

An ambient sound level measurement program was conducted from November 29, 1978 through December 6, 1978. Although rain interrupted the program, measurements were made at six (6) locations on the site as shown in Figure 1.

Two Metrosonics community sound level analyzers were used to acquire the ambient sound level statistics. One unit is owned by the City of Philadelphia and the other by Dames & Moore. These Metrosonics units digitally process the analog sound level signals to provide the equivalent sound level, L_{eq}, and the statistical sound level distributions for the measurement period. The data which were acquired are known as "Exceedance Levels." The sound levels which were measured are those levels exceeded one percent of the time to those levels exceeded 99 percent of the time for the measurement period. The nomenclature used is:

L_x — This is the sound level exceeded X percent of the time during the measurement period. For example, L_{10} is the sound level exceeded 10 percent of the time during the measurement period.

The Metrosonics unit also acquires the equivalent sound level, L_{eq}.

L_{eq} — This is the equivalent steady sound level which provides an equal amount of acoustic energy as the time-varying sound.

The measurement program consisted of one-half hour sample periods at each location until 24 hours of representative sound level statistics were achieved.

The Metrosonics unit measures the ambient sound and computes the "Exceedance Levels." Field personnel are required to ensure that the sound data are typical of the area. Intrusions such as children, excessive wind (wind causes microphone noise), and other factors are not measured. Monitoring of the equipment was accomplished by City of Philadelphia Division of Air Management Services personnel under the direction of Dames & Moore's experienced staff.

Simultaneous with two of the measurement periods, Dames & Moore tape recorded ambient sound for computer-controlled analysis. The resulting statistical data agree very well with the data provided by the Metrosonics units, see Table 3.

The original data are on file at Dames & Moore's Cranford, N.J. office. Analyzed data are provided in this section.

Individual hourly sound level statistics were combined to produce a 24-hour histogram and cumulative distribution of environment sound. These data are shown in Figure 4 through Figure 9. The cumulative distribution data were plotted. These results are shown in Figures 10 through 12. The sound level exceeded 8 hours of the 24 hours (L_{33}) is shown next to these curves. This is the HUD criterion above which the land use is classified "Normally Unacceptable."

Table 4 provides values of L_{eq} for each of the 24 hours plus the 24-hour Equivalent Sound Level, $L_{eq(24)}$ and the Day-Night Sound Level, L_{dn}.

RESULTS

The environmental sound level data described above are used to map regions of "Acceptability" on site drawings. Figure 13 provides zones of acceptability determined in accordance with HUD criteria. Also

included on this figure are the measured L_{33} (8 hr/24 hr) values.

Figure 14 identifies zones on the property where various EPA identified sound levels and goals are exceeded.

It is clear from these figures that the southern portion of the property, bounded by Oregon Avenue, Front Street, Shunk Street, and rear yards of the 2nd Street homes should not be developed as a residential land use without extensive noise mitigation. Some alternative noise mitigation approaches are discussed in the following section. All residences constructed in the northern or southern section of the site should be well built with a large outdoor to indoor noise attenuation. Units should be centrally air conditioned (winter and summer) to minimize use of windows. With the windows open, indoor sounds will be too high to be comfortable.

Noise sensitive rooms, i.e., bedrooms, living rooms, dens, etc., should be placed away from the street. Kitchens, laundry rooms, stairways, closets should be placed between noise sensitive rooms and the street to act as noise buffers.

MITIGATION ALTERNATIVES

a) *Commercial/Light Industrial Barrier*

A commercial/light industrial building constructed along Oregon Avenue and Front Street (to Shunk Street) of two stories height can provide shielding (barrier) of the traffic noise generated along Oregon Avenue and Front Street. Hancock and Howard Streets should not be constructed through, but should end at the rear of the commercial/light industrial building. Figure 15 illustrates this alternative.

The noise abatement can be considerable, resulting in a reclassification of the remaining land use as "Normally Acceptable."

b) *Recreational/Residential*

The southern portion of the site can be reserved for recreational activities. The recreation could not involve activities where concentration or communication is required. Octave band sound pressure level spectra measured at the site indicate that normal speech/hearing will be difficult out-of-doors.

Quieter areas could be developed by the appropriate placement of concrete walls and structures. Masking sounds, generated by a waterfall, together with acoustic barriers, can be used to develop a more pleasing park environment.

The northern section of the site is "Normally Acceptable" for the construction of residences. If a higher density of residences is desired, perhaps a portion of the southern section of the site can be used for parking.

c) *Building Redesign*

The townhouses should be constructed in a manner which guarantees that interior sound levels in sleeping quarters*

> do not exceed an A-weighted sound level of 55 dB for more than an accumulation of 60 minutes in any 24-hour period, or
>
> do not exceed an A-weighted sound level of 45 dB for more than 30 minutes during the hours of 11 p.m. and 7 a.m., or
>
> do not exceed an A-weighted sound level of 45 dB for more than 8 hours in any 24-hour day.

* * * * *

*Based on HUD Circular 1390.2.

If you have any questions regarding the findings described above, or if you have any questions, please do not hesitate to contact us.

Very truly yours,

DAMES & MOORE

Frederick M. Kessler, Ph.D.
Partner

FMK/ht

(NOTE: Tables and charts from report are omitted here but can be found in the record at R737-767.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF CIVIL PROCEDURE INVOLVED

1. UNITED STATES CONSTITUTION

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. FEDERAL STATUTES

42 U.S.C. #1981:

"All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Rule 39.

(b) BY THE COURT. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 60. Relief From Judgment or Order.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 65. Injunctions.

(a) PRELIMINARY INJUNCTION.

(1) NOTICE. No preliminary injunction shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible

upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

Rule 65.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Supreme Court, U. S.
FILED
JUN 7 1979
JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1688

CITY COUNCIL OF THE CITY OF PHILADELPHIA,
FRANK L. RIZZO, MAYOR
HILLEL LEVINSON, MANAGING DIRECTOR
AND THE CITY OF PHILADELPHIA, *Petitioners*

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, et. al.,
Respondents

[Additional Respondents listed inside cover]

SUPPLEMENTAL BRIEF OF PETITIONER CITY COUNCIL OF THE CITY OF PHILADELPHIA, ET. AL.

Mark Jurikson
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City Solicitor
Counsel for Petitioners

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THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

ADDITIONAL RESPONDENTS

HOUSING TASK FORCE OF THE URBAN COALITION,

BERNICE DEVINE,

ESTHER SIERRA MENDEZ,

JEAN THOMAS,

MABLE SMITH,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RUSSELL BYERS, CARLA A. HILLS

ADDITIONAL PARTIES BELOW

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,
MULTICON CONSTRUCTION CORPORATION,
WHITMAN AREA IMPROVEMENT COUNCIL,
PHILADELPHIA HOUSING AUTHORITY

TABLE OF CONTENTS

Page

I. The Existing Plans for the Construction of the Whitman Park Townhouse Project are Structurally Unsafe 2

II. Respondent HUD Has Withheld Over Twenty Million, Three Hundred Thousand Dollars of Community Development Block Grant Funds Due the City of Philadelphia Until Construction of the Whitman Park Townhouse Project Commences 5

Conclusion 7

Certificate of Service 8

Exhibit 1 —Agreement for Architectural and Engineering Work 10

Exhibit 2 —Letter Dated April 23, 1979 to Mr. Don Morrow from Theo C. Rodgers 17

Exhibit 3 —Letter Dated May 15, 1979 to The Honorable Frank L. Rizzo from Don Morrow 20

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1688

CITY COUNCIL OF THE CITY OF PHILADELPHIA, ET AL., *Petitioners*

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, ET AL.

On Petition for a Writ of Certiorari to the UNITED STATES COURT of APPEALS for the Third Circuit

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Petitioner City Council of the City of Philadelphia, Frank L. Rizzo, Mayor, Hillel Levinson, Managing Director and the City of Philadelphia filed their Petition for a Writ of Certiorari in this matter on May 8, 1979. Since the filing of said Petition, two intervening matters have occurred which add substantial weight to Petitioners arguments as to why this Court should grant a Writ of Certiorari. In order to bring these matters to the attention of this Court, Petitioners respectfully submit this Supplemental Brief in accordance with Supreme Court Rule 24(5).

I. THE EXISTING PLANS FOR THE CONSTRUCTION OF THE WHITMAN PARK TOWNHOUSE PROJECT ARE STRUCTURALLY UNSAFE

Petitioner City Council of the City of Philadelphia voted on December 21, 1978 to disapprove the proposed Redevelopment Contract for the 120 Unit Whitman Park Townhouse Project. Part of the basis for said legislative action was a scientific report of Dr. Frederick Kessler of the Engineering Consultant firm of Dames and Moore (A-43). Dr. Kessler reported that the existing construction plans should be substantially modified in order to reduce the extremely high noise levels which exist at the proposed building site. Dr. Kessler stated:

> It is clear from these figures that the southern portion of the property, bounded by Oregon Avenue, Front Street, Shunk Street, and rear yards of the 2nd Street homes should not be developed as a residential land use without extensive noise mitigation. Some alternative noise mitigation approaches are discussed in the following section. All residences constructed in the northern or southern section of the site should be well built with a large outdoor to indoor noise attenuation. Units should be centrally air conditioned (winter and summer) to minimize use of windows. With the windows open, indoor sounds will be too high to be comfortable.
>
> Noise sensitive rooms, i.e., bedrooms, living rooms, dens, etc., should be placed away from the street. Kitchens, laundry rooms, stairways, closets should be placed between noise sensitive rooms and the street to act as noise buffers. (A-50)

Both the District Court and the Third Circuit Court of Appeals totally overlooked Dr. Kessler's recommendation for modification of the existing building plans.

The lower courts have ordered that the 120 unit project be built "as planned". The District Court's January 11, 1979 Order, as affirmed by the Third Circuit Court of Appeals on March 7, 1979, orders that the redevelopment contract (which was disapproved by Petitioner City Council), containing the construction plans be executed with the proposed developer — A & R Development Corp./The Waterford Group, Inc.

During the week of May 20, 1979 Petitioners' legal counsel became aware that the Philadelphia Housing Authority (a state agency), upon the urging of Respondent HUD, had entered into a contract on April 5, 1979 with A & R Development Corp./The Waterford Group, Inc. (See Exhibit #1, attached hereto at pp. 10-16). Said Contract involved the disputed developer performing architectural and engineering work on the existing plans for the 120 unit Whitman Townhouse Project. Even though a Stay of Mandate was issued by the Third Circuit Court of Appeals on April 9, 1979, it has now become clear that A & R Development Corp. proceeded to perform architectural and engineering evaluations on the original project plans with the full knowledge and approval of Respondent HUD.

In a letter dated April 23, 1979, Theo C. Rodgers, President of A & R Development Corp. wrote to Don Morrow, Area Manager for Respondent U.S. Department of Housing and Urban Development (HUD). (See Exhibit #2 attached hereto at pp. 17-19). Said letter reports A & R's progress in evaluating the original plans for the Townhouse Project. This letter makes undisputably clear that the original plans for the 120 unit townhouse project contain many serious and major "discrepancies or inconsistencies". In fact Mr. Rodgers attached to his letter a list of fifteen (15) serious problems or faults which exist in said original plans. Among the major problems cited by A & R are as follows:

1. Grade beam alignment does not agree with bearing wall locations on first floor — B unit.

2. Hall from living room to dining room was less than 3'-0" wide — B unit.
3. Passage from entry hall to stair hall — first floor was less than 3'-0" — B unit.
4. Corbeled brick at second floor adjacent to front entrance is *structurally unsound* — "A" unit.
5. Kitchen layout with range at one end is a *potential hazard.*
6. Master bedroom, second floor, "B" unit — lintels shown over closet and window are *structurally inadequate.* Ceiling of closet is incorrectly shown.
7. First floor slabs are *structurally inadequate* — A & B units.
8. No method is indicated on drawings to support front and rear concrete stoops. (See Exhibit #2 attached hereto at pp. 17-19)

Mr. Rodgers noted that this list is not conclusive.

A & R's Evaluation of the "original plans" adds substantial evidentiary support of Petitioners City Council's decision to disapprove said plans. The fact that A & R has concluded that the Townhouse Plans are "structurally unsound" or "inadequate" gives further emphasis to the need for this Court to grant Petitioners Writ of Certiorari in this matter. It is now unquestionable that the project can not safely be built "as originally planned" and as ordered by the lower courts.

Whether the lower courts will permit an evidentiary hearing as to changes in the project plans is highly unlikely since the District Court previously chose to ignore the proposed structural changes needed to mitigate the extreme problem at the project site.

II. RESPONDENT HUD HAS WITHHELD OVER TWENTY MILLION, THREE HUNDRED THOUSAND DOLLARS OF COMMUNITY DEVELOPMENT BLOCK GRANT FUNDS DUE THE CITY OF PHILADELPHIA UNTIL CONSTRUCTION OF THE WHITMAN PARK TOWNHOUSE PROJECT COMMENCES

By letter dated May 15, 1979, Respondent HUD has notified Petitioner City of Philadelphia that HUD is withholding 30% of the City's Community Development Block Grant funds for Year V (1979-1980) ". . . until such time as the City commences on-site construction of the Whitman Park Public Housing Project . . ." (See May 15, 1979 letter from HUD attached hereto as Exhibit #3 at pp. 20-22). Respondent HUD further states in this letter that:

> Notwithstanding any other provision of this Grant Agreement, the City is prohibited from obligating or drawing down 30% of its Fiscal Year 1979 Grant unless and until on-site construction has actually begun on the Whitman Park Public Housing Project (PA-2-51); provided that, if a Federal Court enters a final order in *Resident Advisory Board v. Rizzo* which prevents the City from fulfilling this condition, HUD will consider modification thereof.

The City of Philadelphia's Community Development Block Grant funds for Year 5 amounts to $67,748,000. The 30% which Respondent HUD has withheld until construction of the disputed project commences amounts to $20,324,400.

Petitioner City of Philadelphia is in effect being penalized by Respondent HUD for Petitioners' litigation of this matter. The 20 million dollars which HUD has withheld from the City is money which the City of

Philadelphia planned to spend on badly needed housing and community development projects totally unrelated to the 120 Whitman Park Townhouses. Respondent HUD is in effect making a blatant attempt to coerce Petitioner City of Philadelphia to withdraw its Petition for Certiorari in this matter and otherwise cease all litigation concerning this disputed housing project.

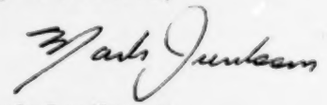
Petitioners are convinced that they have acted in the Public's interest in this matter. The fact that Respondent HUD has withheld over 20 million dollars from the citizens of the City of Philadelphia specifically because Petitioners have exercised their constitutional rights of due process by filing its Petition for Certiorari, is an additional reason as to why this Court should grant said Petition.

The legislature of this country's fourth largest city has acted in good faith in deciding to disapprove the proposed redevelopment contracts for the Whitman Park Townhouse Project. As a direct result of Petitioners filing the instant Petition for a Writ of Certiorari, Respondent HUD has undertaken a course of action which will cause irreparably injury to the citizens of the City of Philadelphia and totally disrupt the City's plans for community development in 1979.

CONCLUSION

For the foregoing reasons, your Petitioners respectfully submit that a Writ of Certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



Mark Jurikson
Deputy City Solicitor

Sheldon L. Albert
City Solicitor

201 City Hall
Philadelphia, PA 19107
(215) MU6-6205

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June 1979, three copies of the Petition for Writ of Certiorari were hand delivered to:

Walter S. Batty, Esquire
Assistant City Attorney
3310 U.S. Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
Attorneys for Respondent HUD

Harold R. Berk, Esquire
Jonathan M. Stein, Esquire
Community Legal Services
Sylvania House
Juniper and Market Streets
Philadelphia, Pennsylvania 19107
Attorneys for Respondent RAD

William F. Hall, Jr., Esquire
994 Curtis Building
Philadelphia, Pennsylvania 19106
Attorney for Respondent HUD

Joseph M. Gindhart, Esquire
2015 Land Title Building
Broad and Sansom Streets
Philadelphia, Pennsylvania 19110
Attorney for WAIC

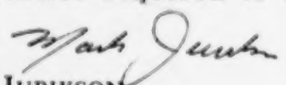
Peter A. Galante, Esquire
1234 Market Street
Philadelphia, Pennsylvania 19107
Attorney for RDA

Harold Cramer, Esquire
Arthur Lefco, Esquire
Fidelity Building, 15th Floor
Philadelphia, Pennsylvania 19109
Attorneys for PHA

Charles W. Bowser, Esquire
1845 Walnut Street
Suite 1300
Philadelphia, Pennsylvania 19103

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.



MARK JURIKSON
Deputy City Solicitor
Counsel for Petitioner

201 City Hall
Philadelphia, Pa. 19107

Exhibit 1

AGREEMENT FOR ARCHITECTURAL AND ENGINEERING WORK

This Agreement made this 5th day of April, 1979, by and between A & R Development Corporation/The Waterford Group, Inc., a joint venture, hereinafter referred to as the "Contractor" and the Philadelphia Housing Authority, a public body organized and existing pursuant to the law of the Commonwealth of Pennsylvania, hereinafter referred to as "PHA".

Whereas, PHA desires to obtain certain architectural and engineering work for a low-rent public housing project designated Project No. PA-2-51, Whitman Townhouses, consisting of 120 dwelling units and related appurtenances;

And, Whereas, the Contractor will provide such work for PHA, the Contractor and PHA agree as follows:

1. *Identification of Project.* The project for which the work is to be provided by the Contractor is identified as Project No. PA-2-51, Whitman Townhouses in the Annual Contributions Contract between the PHA and the United States Department of Housing and Urban Development, hereinafter referred to as "HUD", which project is situate in the Whitman Urban Renewal Area of the City of Philadelphia.

2. *Compensation.* The Contractor shall be compensated for the work to be performed under this Agreement on a cost reimbursable basis as defined in section 5. In no event shall the total compensation to be paid to the Contractor under this Agreement exceed the maximum amount of $45,000 unless increased by written agreement between the Contractor and PHA

and approved by HUD. Such agreement shall state the changes, if any, in this Agreement and the increase in the maximum amount of compensation to be paid to the Contractor. This Agreement is being entered into between the Contractor and PHA with the expectation that a certain Turnkey Contract of Sale providing for the purchase of the Project by the PHA from the Contractor shall be executed. In such event, any further architectural and engineering work shall be performed under the terms of the Turnkey Contract of Sale. Payment for the work performed under this Agreement prior to the execution of the Turnkey Contract of Sale for which payment has not been made pursuant to this Agreement prior to such execution shall be included in the cost of the work under the Turnkey Contract of Sale and shall be paid for in accordance with the provisions of that contract. In the event that the Turnkey Contract of Sale shall submit to the PHA its detailed invoice showing the cost of the work completed and for which payment is claimed, and upon approval by the PHA and HUD, the invoice will be paid. Thereafter, at thirty (30) day intervals, until either the work is completed or the Turnkey Contract of Sale is executed, Contractor may submit its invoices for payment.

3. *Scope of Work.* The Contractor shall supply all professional and such other services as are necessary to accomplish the following work for the project: rewriting the specifications prepared by the Architects, Trott and Bean for the Project including the requirements for the building materials to be used; and redrawing the following, the site plan, the landscape plan, the construction drawings, and the mechanical drawings.

4. *Time of Work.* The Contractor shall commence the work immediately upon the execution of this Agreement. It is anticipated that 90% of the rewriting of the specifications shall be completed by April 23,

1979, and that 60% of the redrawing of the site plan, landscape plan, construction drawings, and mechanical drawings shall be completed by such date.

5. *Cost of the Work.* The Contractor shall be reimbursed for the costs necessarily incurred in the proper performance of the work in accordance with the following inclusions and exclusions.

a. *Inclusions*

(1) Salaries and wages of Contractor's employees directly employed in doing the work.

(2) Cost of contributions, assessments or taxes for such items as unemployment compensation and social security insofar as such cost is based on wages, salaries, or other remuneration paid to employees of the Architect.

(3) Cost of all materials and supplies incorporated in the work.

(4) Reasonable transportation, traveling, and housing expenses incurred in necessary travel to and from the Project site.

(5) Reproduction of drawings and specifications.

(6) Sales or use taxes on all materials and supplies incorporated into the work imposed by any governmental body for which the Contractor is liable.

(7) Minor expenses such as telegrams, long distance telephone calls, expressage and similar petty cash items in connection with the work.

(8) Cost of subcontracts for work performed under this Agreement substantiated by the subcontractors' invoices showing the work done and the charge for the work.

b. *Exclusions*

(1) The cost of the work shall not include any items of Architect's overhead, including salaries or other compensation of Architect's officers, executives, general managers,

estimators, auditors, accountants, purchasing and contracting agents and other employees at the Architect's principal or branch offices except pursuant to 5a.(1).

(2) Any part of the costs of Contractor's principal and branch offices.

(3) Any return on or cost of the Contractor's working capital including interest on the Contractor's capital employed in the work.

(4) Overhead or general expenses of any kind.

(5) Costs due to the negligence of the Contractor, any subcontractor, or anyone directly or indirectly working for them, and for whose acts any of them may be liable including but not limited to correction of defective work.

(6) Kickbacks, rebates or discounts received or receivable in connection with the work.

(7) The cost of any item not specifically and expressly included in section 5.a.

6. *Contractor's Accounting Records.* Records of the Contractor's direct personnel and reimbursable expenses pertaining to the Project shall be kept on a generally recognized accounting basis sufficient to reflect all costs claimed to have been incurred in the performance of the work. The PHA, HUD and the Comptroller General of the United States or their authorized representatives, shall have full and free access to such records, including the right to audit, and to make excerpts and transcripts from such records. These records shall be kept for a period of three years from the date of the final payment made under this Agreement.

7. *Prevailing Wages.* The Contractor and his agents shall pay or cause to be paid to all architects, technical engineers, draftsmen, and technicians employed on any part of the Work under this Agreement not less than the salaries or wages prevailing in the locality, as determined or adopted

subsequent to a determination under applicable State or local law by the Government. The Contractor shall furnish, with each statement submitted for services, a certification that he has paid not less than such rates to his technical personnel. The requirement shall not apply to executive, clerical, and administrative employees.

8. *Withholding of Wages.* In cases (of which the PHA has notice) of underpayment of wages to be paid by the requirement above, the PHA may withhold from the Contractor out of payments due, an amount sufficient to pay the employees involved the differences between the wages required to be paid under section 7. above and the wages actually paid such employees for the total number of hours worked. The amounts withheld may be disbursed by the PHA for and on account of the Contractor to the respective employees to whom they are due.

9. *Nondiscrimination.* In connection with the performance of work under this Agreement, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, sex, color, religion, age or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, sex, color, religion, age, or national origin. Such action shall include, but not limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor further agrees to insert the foregoing provisions in all contracts made by him in connection with the architectural and engineering services called for under this Agreement, except contracts for standard commercial supplies or raw materials.

10. *Officials Not to Benefit.* No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Agreement or to any benefit that may arise therefrom.

11. *Interest by Members of Local Authority and Local Governing Body.* No member, officer, or employee of the PHA, no member of the governing body of the locality in which the Project is situated, no member of the governing body in which the PHA was activated, and no other public official of such locality or localities who exercises any functions or responsibilities with respect to the Project shall, during his tenure, and for one year thereafter, have any interest, direct or indirect, in this Agreement or the proceeds thereof.

12. *Covenant Against Contingent Fees.* The Contractor warrants that he has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the PHA the right to terminate this Agreement or, at its discretion, to deduct from the compensation payable to the Contractor the amount of such commission, brokerage, or contingent fee.

13. *Assignability.* The Contractor shall not assign or transfer any interest in this Agreement except that claims for monies due or to become due him from the PHA under the Agreement may be assigned with the PHA's and HUD's prior approval to a bank, trust company, or other financial institution. If the Contractor is a partnership, this contract shall inure to the benefit of the surviving or remaining members of such partnership approved by HUD.

14. *Termination.* The PHA or HUD may, by seven days written notice to the Contractor, terminate this Agreement either for convenience or for failure of the Contractor to fulfil his obligations under their Agreement. Upon receipt of such notice, the

Contractor shall 1) immediately discontinue all work under this Agreement unless the notice directs otherwise and 2) upon demand of either the PHA or HUD deliver to PHA or HUD all data, drawings, specifications and reports completed by the Architect or in process. Upon termination, the Contractor shall be entitled to compensation for all work performed up to the date of termination in accordance with the provisions of this Agreement.

IN WITNESS WHEREOF, the PHA and the Contractor have executed this Agreement, the day and year first above written.

Philadelphia Housing Authority

BY _____

A & R Development Corp./The Waterford Group, Inc., a joint venture

BY _____

President: A & R Development Corp.

Exhibit 2

A and R DEVELOPMENT CORPORATION/
THE WATERFORD GROUP, INC.
A JOINT VENTURE

2525 N. Calvert Street
Baltimore, Maryland 21218
(301) 243-0600

April 23, 1979

Mr. Don Morrow, Area Manager
U.S. Dept. of Housing and Urban Development
Philadelphia Area Office
Curtis Building
625 Walnut Street
Philadelphia, Pennsylvania 19106

Attention: Ernest Smollow
Multi-family Representative

Re: WHITMAN PARK TOWNHOUSES
PA 2-51

Gentlemen:

In accordance with the conditions noted in the "Agreement for Architectural and Engineering Work" dated April 5, 1979, by and between the Philadelphia Housing Authority and A and R Development Corporation/The Waterford Group, Inc. — A Joint Venture, we transmit herewith three (3) sets of plans, 60% complete and three (3) sets of specifications — 90% complete, for your review and comment.

There exists many inaccuracies and discrepancies in the original plans and specifications by Trott and Bean and while we have done exhaustive research into these problems, we cannot be assured at the 60% com-

pletion level that they will or will not result in increased costs or changes beyond the original scope of work. In order to expedite the review process, we are enclosing herewith a tabulation of the specific items or areas of concern that may require certain waivers or at least a joint decision by HUD, PHA, and the developer as to the most desirous method to cure the problems.

We are available to meet with you at your earliest convenience and stand ready to complete the plans and specifications in the most expeditious manner.

Sincerely,

Theo C. Rodgers
President
A and R Development Corp.

TCR:lba
Encl:
cc: Judge Broderick, Phila. Housing Auth., Morton Baruch, Victor Villapano, William Hall, Phila. Redev. Auth., Paul Walter, Esq., The Waterford Group Inc.

WHITMAN PARK TOWNHOUSES PA 2-51

The following is noted as discrepancies or inconsistencies in the original contract documents dated October 12, 1970 and certain review comments.

I. Grade beam alignment does not agree with bearing wall locations on first floor — B unit.
II. Bearing wall dimensions are out of scale 2'-0'' ± first floor — B unit.
III. Hall from living room to dining room was less than 3'-0'' wide — B unit.
IV. Passage from entry hall to stair hall — first floor was less than 3'-0'' — B unit.

V. Corbeled brick at second floor adjacent to front entrance is structurally unsound — "A" unit.
VI. Kitchen — counterspace on either side of kitchen sink does not meet M.P.S.
VII. Kitchen layout with range at one end is a potential hazard.
VIII. Storage requirements — does not comply with M.P.S. for convenient outdoor use. Complies with M.P.S. cubic foot requirements if storage under stairs and stair landings is counted.
IX. Master bedroom, second floor, "B" unit — lintels shown over closet and window are structurally inadequate. Ceiling of closet is incorrectly shown.
X. Downspout and gutter arrangement does not work — "B" unit.
XI. First floor slabs are structurally inadequate — A & B units.
XII. No method is indicated on drawings to support front and rear concrete stoops.
XIII. Review comments indicate R-19 insulation required in side walls — this is not an M.P.S. 4900.1 requirement.
XIV. Provision for handicapped in a family 3 bedroom townhouse is not required by M.P.S. 4900.1.
XV. Original specifications call for three courses of tile above edge of tub. This is a potential high maintenance problem when showers are provided.

---

* This is not a conclusive list.

Exhibit 3

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
AREA OFFICE
CURTIS BUILDING, 625 WALNUT STREET
PHILADELPHIA, PENNSYLVANIA 19106
May 15, 1979

REGION III
Curtis Building
6th and Walnut Streets
Philadelphia, Pennsylvania
19106

IN REPLY REFER TO:
3.2CM
City of Philadelphia
B-79-MC-42-0012

Honorable Frank L. Rizzo
Mayor of Philadelphia
Philadelphia, Pennsylvania 19107

Dear Mayor Rizzo:

We are pleased to announce the approval of your Year V Application for Community Development Block Grant funds in the amount of $67,748,000.

Enclosed are three copies of Form HUD-7082, Funding Approval, under Title I of the Housing and Community Development Act of 1974, as amended, with attached contract provisions. Please execute this document, return two copies to our office and retain one copy for your files. Copies of the approved Cost Summary are also enclosed.

Also enclosed is a list which indicates those projects and/or activities which are approved conditionally pending environmental assessment.

Please note that in no event should a request for payment be submitted to obtain funds for activities which have been given conditional approval pursuant to 24 CFR 570.311(f) and Section 16(a) of Form HUD-

7082 (Funding Approval under Title I of the Housing and Community Development Act of 1977 as Amended) without the express written authorization of HUD.

The starting date for the City's fifth program year will be May 15, 1979. However, funds may be expended for only those fifth year activities for which there are no conditions.

Detailed in Section 18 of the Year V Funding Agreement are the specific conditions upon which HUD is approving the entitlement application. Conditions I and II relate to revisions to data and strategy statements in the Application itself, while Conditions III through VI relate to actions the City will be required to undertake relative to housing. Conditions III, V and VI preclude the City from utilizing a total of 90% of the Year V Entitlement Grant with 30% increments attached to each of these three conditions. As a result, the City's letter-of-credit will be increased by $6,774,800 or 10% of the Year V Grant upon receipt of the signed HUD-7082 Funding Approval. Additional incremental increases in the letter-of-credit will be executed upon the City's compliance with the three cited conditions.*

C. *Condition III*

Condition III withholds 30% of the Year V funds until such time as the City commences on-site construction of the Whitman Park Public Housing Project. This is required in view of the City's housing assistance needs and the failure of the City to utilize all available resources to provide housing choice for low and moderate income and minority group persons in non-impacted areas.

---

* Note — Only sections of pages 1, 5, 8 and 11 of this letter are reprinted here. All other pages of this letter do not specifically relate to the Whitman Park Project.

C. *CONDITION III*

Notwithstanding any other provision of this Grant Agreement, the City is prohibited from obligating or drawing down 30% of its Fiscal Year 1979 Grant unless and until on-site construction has actually begun on the Whitman Park Public Housing Project (PA-2-51); provided that, if a Federal Court enters a final order in *Resident Advisory Board v. Rizzo* which prevents the City from fulfilling this condition, HUD will consider modification thereof.

We trust that the City will take action as expeditiously as possible to comply with the contract conditions and the requirements set forth in the approval letter. Should the Area Office be able to provide you with any assistance in this regard, please do not hesitate to contact us.

Sincerely,

Don Morrow
Area Manager

Enclosures

cc: Mr. John Andrew Gallery

Supreme Court, U. S.
FILED
MAY 25 1979
MICHAEL RODAK, JR., CLERK

No. 78-1688

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY COUNCIL OF THE CITY OF PHILADELPHIA, ET AL., PETITIONERS

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
BURTON D. FRETZ
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the district court (Pet. App. A-12 to A-28) is reported at 463 F. Supp. 694. The order of the court of appeals (Pet. App. A-32 to A-35) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-32 to A-35) was entered on March 7, 1979. A petition for rehearing was denied on April 2, 1979 (Pet. App. A-36). The petition for a writ of certiorari was filed on May 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court was required to relieve petitioners from the court's earlier injunction against interference with construction of a low income housing project.

STATEMENT

This litigation had its antecedents in 1957, when the Philadelphia Housing Authority (PHA) and the predecessor of the Department of Housing and Urban Development (HUD) signed a contract authorizing PHA to begin development of a federally-financed public housing project in the Whitman section of Philadelphia (Pet. App. A-14). The project was stalled in its early stages by local opposition, however, and at least one developer refused to carry out its contract to build the project (Pet. App. A-15 to A-17). In 1970 the Mayor and City Council of Philadelphia approved a new plan to build townhouses on the site, a new developer was awarded the contract, and construction began. Continued local opposition and modifications to the contract further delayed progress (Pet. App. A-17 to A-18). In 1972 Mayor Rizzo ordered the project terminated, and the City of Philadelphia paid the builder $806,000 in cancellation costs (Pet. App. A-18).

The Resident Advisory Board, a community organization representing residents eligible for housing in the townhouse project, brought suit against the mayor and others, alleging that cancellation of the project was in violation of the Civil Rights Acts of 1866 and 1871, 42 U.S.C. 1981 *et seq.*; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*; and the Fifth, Thirteenth and Fourteenth Amendments. The United States District Court for the Eastern

District of Pennsylvania, after a 57-day trial, found that the City of Philadelphia had "acted with a racially discriminatory purpose" in cancelling the project, that cancellation had "a racially discriminatory effect" on the plaintiffs, and that the plaintiffs were entitled to relief under the statutory and constitutional provisions cited. *Resident Advisory Board* v. *Rizzo*, 425 F. Supp. 987, 1013 (E.D. Pa. 1976). On November 5, 1976, the district court ordered PHA, the City of Philadelphia, HUD and other defendants "immediately [to] take all necessary steps for the construction of the Whitman Park Townhouse Project as planned." *Id.* at 1029. The court of appeals affirmed, 564 F. 2d 126 (3d Cir. 1977), and this Court denied certiorari. 435 U.S. 908 (1978).

Following this Court's denial of certiorari, the district court met with all parties and issued an order (Pet. App. A-24 to A-25) setting deadlines for the various steps " 'required to complete construction of the 120 townhouses, pursuant to the Court's Order of November 5, 1976' " (Pet. App. A-25). On December 21, 1978, however, the City Council of Philadelphia disapproved the townhouse project and passed a resolution requesting the Philadelphia Redevelopment Authority to prepare plans for the development of "not less than 250 dwelling units on scattered sites within the Whitman Urban Renewal Area * * *" (Pet. App. A-12).

The City of Philadelphia then moved under Fed. R. Civ. P. 60(b)(5) and (6) to amend the district court's order of November 5, 1976, to allow construction of scattered-site housing in place of the townhouse project. The district court refused to modify its order (Pet. App. A-12 to A-28). It held (Pet. App. A-26 to

A-27) that the City had "failed to present any reason sufficient to justify relief from the operation of" the court's original judgment and that the question whether the original townhouse plan must go forward was *res judicata*. The court ordered that "the townhouses shall be constructed as ordered by this Court on November 5, 1976 * * *" (Pet. App. A-28).

The court of appeals affirmed without opinion (Pet. App. A-32 to A-35).

ARGUMENT

The district court's order is correct, and petitioners present no issue warranting this Court's review.

1. Contrary to petitioners' contention (Pet. 20-26), the district court did not improperly ignore the Pennsylvania Urban Redevelopment Law, Pa. ~~STAT.~~ Stat. Ann. tit. 35, § 1710(j) (Purdon) (see Pet. App. A-38). That law authorizes a "governing body" to approve a redevelopment contract and, under normal circumstances, presumably would enable petitioners to authorize scattered-site housing rather than townhouses. But this issue of state law does not call for review. *Butner* v. *United States*, No. 77-1410 (Feb. 21, 1979), slip op. 9. And neither that state law nor any other can enable petitioners to evade a lawful decree of a federal court. As the district court noted (Pet. App. A-26), the townhouse project was not the court's doing; it was approved by the Mayor and City Council in 1970. The Mayor's attempt to cancel that project was fully litigated and found to be in violation of federal law. The district court ordered the project reinstated, the court of appeals affirmed, and this Court denied

certiorari. Petitioners cannot now pretend that that litigation never occurred; they are bound by it.[1]

By the same token, petitioners' argument (Pet. 21) that the scattered-site plan will have no adverse effect on the class represented by the Resident Advisory Board—the plaintiff in the original litigation—is irrelevant. Petitioners are not free to disregard the district court's original order and substitute some other plan more to their liking, and they are not free to second-guess the class about the class's own interests.

2. Similarly without merit is petitioners' contention (Pet. 27-31) that the district court's refusal to modify its original judgment conflicts with various decisions of this Court because it allegedly exceeds the court's equity jurisdiction (Pet. 27), usurps legislative authority (Pet. 28-29), or grants injunctive relief without a hearing (Pet. 29-31). The district court did no more than refuse to grant petitioners the relief they sought from the court's original decree. The propriety of the relief ordered by that decree was fully litigated in a 57-day trial and thoroughly reviewed on appeal.[2] Petitioners have not shown the existence of the kind of grievous injustice that would call for modification of

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[1]Petitioners argue (Pet. 21-22) that Paragraph 15 of the implementation order issued after this Court's denial of certiorari (see Pet. App. A-24) authorized the City Council's action here. But that paragraph merely ordered that the City Council "expeditiously consider the new redeveloper and redevelopment contract" and take final action by a certain date. It did not authorize the City Council to cancel the townhouse project entirely. At all events, the district court is in the best position to interpret the meaning of its own order.

[2]See also *Sworob* v. *Harris*, 451 F. Supp. 96 (E.D. Pa.), aff'd, 578 F. 2d 1376 (3d Cir. 1978), cert. denied, No. 78-557 (Jan. 8, 1979).

the decree. *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). The present litigation is nothing more than an attempt by petitioners to avoid the day of reckoning that the district court's original decree requires, and the court was well within its discretion in refusing to modify its order. See, *e.g.*, *Martella* v. *Marine Cooks & Stewards Union*, 448 F. 2d 729 (9th Cir. 1971), cert. denied, 405 U.S. 974 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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